TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 463

NEW STATE ICE COMPANY, APPELLANT,

vs.

ERNEST A. LIEBMANN

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

FILED OCTOBER 15, 1931

(36,277)

(36,277)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 463

NEW STATE ICE COMPANY, APPELLANT,

vs.

ERNEST A. LIEBMANN

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Original	Print
Proceedings in United States circuit court of appeals, tenth circuit	a	1
Caption (omitted in printing)	a	
Record from district court of the United States, Western Oklahoma	1	1
Citations (omitted in printing)	1	
Notice of appeal (omitted in printing)	1	
Order enlarging time within which to docket appeal (omitted in printing)	2	
Complaint	2	1
Answer	6	4
Order of submission (omitted in printing)	11	
Memoranda of decision on merits of the controversy	11	9
Decree	21	19
Statement of evidence	22	20
Testimony of Ernest A. Liebmann	22	20
O. W. Bartell	24	22
T. F. Hurt	24	22
R. D. Davis	24	23
Joe Brasier	25	23
S. B. Farnham	25	23
George Winchell	25	24

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1931

	Original	Print
Offer in evidence—License issued by commission	26	24
Complainant's demurrer	27	25
Testimony of W. P. Hill	27	25
Exhibit 1—Order No. 506 of Oklahoma Corporation Commission	28	27
Exhibit 2—Order No. 1906 of Oklahoma Corporation Commission	30	28
Testimony of Campbell Russell	38	37
L. J. Lahman	39	38
Edwin Dubarr	42	40
L. C. Smith	43	42
A. J. Authenrieth	44	42
Stipulation as to facts	45	44
Order approving statement of evidence	46	44
Petition for appeal and allowance thereof (omitted in printing)	47	
Petition for appeal and allowance thereof (omitted in printing)	48	
Assignments of error (omitted in printing)	48	
Assignments of error (" " ")	49	
Bond on appeal (" " ")	50	
Præcipe (" " ")	50	
Clerk's certificate (" " ")	52	
Opinion, Phillips, J	53	45
Decree	65	57
Petition for appeal	66	58
Assignments of error	69	59
Order allowing appeal	71	60
Supersedeas bond on appeal (omitted in printing)	72	
Citation and service (omitted in printing)	80	
Stipulation re transcript of record	81	61
Notice of appeal	83	62
Clerk's certificate (omitted in printing)	85	
Statement of points to be relied upon and stipulation as to printing record	86	63

[fols. a–2]

IN UNITED STATES DISTRICT COURT, WESTERN OKLAHOMA

No. 1107. Equity

NEW STATE ICE COMPANY, a Corporation, Complainant,

vs.

ERNEST A. LIEBMANN, Defendant.

COMPLAINT—Filed Mar. 31, 1930

Comes now the above named complainant and, for its cause of action against the above named defendant, states:

(1) That it is a corporation duly organized and existing under the laws of the State of Delaware and a citizen of that State, having its principal place of business at Dover therein, and duly authorized to do business in the State of Oklahoma as a foreign corporation; that the defendant is a citizen of the State of Oklahoma residing at Oklahoma City therein; that this is a suit in equity arising under and involving the construction and application of the Constitution of the United States, and that the matter in controversy exceeds, exclusive of interest and cost, the sum or value of three thousand dollars.

(2) That on April 7, 1925, the Legislature of the State of Oklahoma duly passed an act entitled: "An Act declaring the manufacture, sale and distribution of ice to be a public business, placing same under jurisdiction of the Corporation Commission; providing a license fee, and penalty for violation thereof," being Chapter 147 Session Laws of Oklahoma, 1925; that under the provisions of this act the manufacture, sale and distribution of ice is a public business and properties invested therein are public utilities, subject to regulation and control by the Corporation Commission of the State of Oklahoma; that no person, firm or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license or permit for such purpose from said Commission, and the manufacture, sale and distribution of

[fol. 3] ice by any person, firm or corporation within said State, without such license or permit, constitutes a misdemeanor. That Section 5 of this act provides:

"That the Corporation Commission shall have the same power and authority to be charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies, and shall have the same power to fix rates, rules, charges and regulations to be observed by such person, firm or corporation engaging in the manufacture, sale and distribution of ice, or either of them, and the affording of all reasonable conveniences, facilities, service, as it may impose as to the transportation and transmission companies."

(3) That complainant is engaged in the manufacture and sale of ice in Oklahoma City, Oklahoma, under and by virtue of a license or permit duly issued to it by said Commission pursuant to the terms and provisions of said act, and has fully complied with the terms and provisions of said act and the Rules and Regulations promulgated by said Commission thereunder; that said license or permit so issued to it by said Commission for the manufacture and sale of ice under the provisions of said act constitutes and is a franchise property right; that it has invested in the business of the manufacture and sale of ice in Oklahoma City, under said license or permit, a sum in excess of five hundred thousand dollars.

(4) That the defendant owns and is in the possession of Lots Twenty-two (22) to Twenty-four (24) inclusive, Block Thirty-two (32), South Central Schilling Addition to Oklahoma City, Oklahoma County, Oklahoma, and, on February 10, 1930, obtained a building permit from Oklahoma City to build and construct an ice plant thereon for the manufacture, sale and distribution of ice within Oklahoma City; that shortly thereafter, he commenced the building and construction of an ice plant upon said lots for the manufacture, sale and distribution of ice within said city, and is now in the process of the construction of said building upon said

lots for such purposes; that he has not made an application [fol. 4] to said Commission for a license or permit to engage in the manufacture, sale and distribution of ice in said City; that he does not intend to make such application, and will, on or about May 15, 1930, commence the business of the manufacture, sale and distribution of ice within said City without complying with said act, in competition with the complainant herein.

(5) That the defendant has no right to engage in the business of the manufacture, sale and distribution of ice within said city without first having obtained a license or permit from said Commission so to do; that such manufacture, sale and distribution of ice by him in said City, without having obtained a license or permit from said Commission, will injuriously affect the business, revenues and properties of the complainant invested in such business and deprive it of its property without due process of law; that unless he is restrained and enjoined by this Court he will commence the business of the manufacture, sale and distribution of ice within said City without complying with said act and in open violation thereof; that he, in the manufacture, sale, and distribution of ice, will cover and include the territory now served and being served by the complainant in the manufacture and sale of ice under its license or permit from said Commission; that under the facts and circumstances as set forth herein the complainant has no plain, adequate remedy at law and, unless this court issues an injunction restraining and enjoining said defendant from the unlawful manufacture, sale and distribution of ice within said City it will suffer irreparable injury and loss and it is therefore entitled to injunctive relief for the preservation of its properties and revenues invested in said business and committed to public service and use under and by virtue of the permit issued to it by said Commission under said act.

Wherefore, Complainant respectfully prays for judgment against said defendant as follows:

(1) That he, his agents, attorneys, servants and employees, and all persons acting by, through or under him, or them, be perpetually enjoined and restrained from the manufacture, sale and distribution of ice within Oklahoma City without first having obtained a license or permit from

the Corporation Commission of the State of Oklahoma, [fol. 5] under said act approved April 7, 1925, being Chapter 147 Session Laws of Oklahoma, 1925.

(2) That this court assign this cause for hearing on complainant's application for an interlocutory injunction and that upon said hearing this court issue its injunction preliminary until final hearing, and perpetual thereafter.

(3) That in the meantime a temporary restraining order be issued herein temporarily restraining and enjoining said defendant from the manufacture, sale and distribution of ice within Oklahoma City without first having obtained a license or permit from said Commission under said act.

(4) That upon the final hearing of this cause said preliminary injunction be made perpetual, and that the complainant have such other and further relief as it may be entitled, including a judgment for costs.

J. H. Everest, J. B. Dudley, Phil D. Brewer, Guy L. Andrews, Solicitors for Complainant. Everest, Dudley & Brewer, of Counsel.

Duly sworn to by Sidney L. Brutsche. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 6] IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 19, 1930

Comes now the above named defendant, and for answer to the complaint of the complainant filed herein denies generally and specifically each and every and all the allegations in said complaint contained, except such thereof as are hereinafter expressly admitted:

1. Said defendant admits that said complainant is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and doing business in the State of Oklahoma; admits that said defendant is a citizen of the State of Oklahoma, residing in Oklahoma City in said county and state; admits that this is a suit in equity

arising under and involving the application of the Constitution of the United States, and that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars.

2. Said defendant admits that on April 7, 1925 the Legislature of the State of Oklahoma passed an act entitled "An Act declaring the manufacture, sale and distribution of ice to be a public business; placing same under jurisdiction of the Corporation Commission, providing a license fee, and penalty for violation thereof" being Chapter 147 Session Laws of Oklahoma, 1925; admits that under the provisions of said act the manufacture, sale and distribution of ice is declared to be a public business, subject to regulation by the Corporation Commission of the State of Oklahoma; admits that said act provides that no person, firm or corporation shall be permitted to manufacture, sell or distribute ice within the State of Oklahoma without first having secured a license for such purpose from said Corporation Commission; and that by the provisions of said act the manufacture, sale and distribution of ice by any person, firm or corporation within said state, without such license, is made a misdemeanor and admits that Section 5 of said act is as stated in said complaint.

(3) Said defendant admits that said complainant is engaged in the manufacture of ice in Oklahoma City, Oklahoma, under a license or permit issued to it by the Corporation Commission of the State, but specifically denies that such license or permit constitutes a franchise property right, and denies that said complainant has a sum in excess [fol. 7] of Five Hundred Thousand Dollars invested in the business of the manufacture and sale of ice in said city.

4. Said defendant admits that he owns and is in possession of Lots Twenty-two (22) to Twenty-four (24) inclusive in Block Thirty-two (32) Schillings Addition to Oklahoma City, Oklahoma County, State of Oklahoma; that he has obtained a building permit from said city to build and construct an ice plant thereon; that he has commenced the building and construction of an ice plant upon said lots, and is now in the process of the construction of said building; admits that he has not made application to the Corporation Commission of the State of Oklahoma for a license

or permit to engage in the business of manufacturing and selling ice in said city, and that he does not intend to make such application, and admits that he will commence the business of the manufacture, sale and distribution of ice in said city, in competition with said complainant.

5. Said defendant specifically denies that he has no right to engage in the business of the manufacture, sale and distribution of ice within Oklahoma City, Oklahoma, and denies that the manufacture, sale and distribution of ice in said city, by him, will deprive said complainant of its property without due process of law.

6. Further answering herein, said defendant specifically denies that the business of the manufacture, sale and distribution of ice in the State of Oklahoma is in fact a public business and that the properties used therein are public utilities; denies that said complainant in manufacturing, selling and distributing ice in Oklahoma City, Oklahoma, is engaged in a public business, denies that the property of said complainant used in said business is a public utility, and said defendant further specifically denies that the Corporation Commission of the State of Oklahoma is vested with the power and authority and charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in the State of Oklahoma; denies that said Corporation Commission has power to fix rates, rules, charges and regulations to be observed by persons, firms or corporations engaged in the business of manufacturing, selling and distributing ice in said state, and denies that said Corporation Commission is vested with the power and [fol. 8] authority to enforce its orders against any person, firm or corporation engaged in the business of the manufacture, sale and distribution of ice, without first having secured a license or permit so to do.

7. Further answering herein, said defendant states and avers that said Chapter 147 Session Laws of Oklahoma of 1925 set out and referred to by complainant in its complaint herein, and entitled "An Act declaring the manufacture, sale and distribution of ice to be a public business; placing the same under jurisdiction of the Corporation Commission, providing a license fee, and penalty for violation hereof" approved April 7, 1925, by which it is pro-

vided that no person, firm or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license for such purpose from the Corporation Commission, and that said Corporation Commission shall not issue a license to any person, firm or corporation for the manufacture, sale and distribution of ice, except upon a hearing had, at which the necessity for the manufacture, sale and distribution of ice at the point, community or place desired, and providing: "If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community, or place, are sufficient to meet the public needs therein, the said Corporation Commission may refuse and deny the applicant (sic) for said license," and providing that any person, firm or corporation who shall engage in said business without first obtaining the license required shall be guilty of a misdemeanor and be punishable by a fine of not to exceed Twenty-five Dollars, and each day's violation shall constitute a separate offense, and providing further that the Corporation Commission may impose an additional fine of Five Hundred Dollars ($500.00) for each of said violations, is in violation of the rights guaranteed to said defendant and protected under and by virtue of the Constitution of the United States and particularly Section Ten of Article One, which protects contracts against impairment, and the Fourteenth Amendment to said Constitution prohibiting any state from depriving any person of life, liberty or property without due process of law, and prohibiting any state from passing any law denying to any person within its jurisdic-[fol. 9] tion the equal protection of the laws. Defendant states that he is the owner of the real estate hereinbefore described; that he has constructed a substantial building thereon to be used for the purpose of manufacturing ice therein, and has purchased all necessary machinery, and that he has expended the sum of about Forty Thousand Dollars therefor; that if he is prevented by the order of this court from using said property in the business of the manufacture, sale and distribution of ice, he will be deprived of his property without due process of law, in violation of the aforesaid provisions of the Constitution of the United States, and will suffer great and irreparable injury.

8. Defendant further states that the manufacture, sale and distribution of ice is not in fact a public business, and the properties employed in such business are not public utilities; that the State of Oklahoma is without power or authority to require a person, firm or corporation to secure a license or permit from the Corporation Commission of said state before engaging in such business, and said Corporation Commission is without power or authority to prohibit any person, firm or corporation from engaging in said business, or to punish by fine any person, firm or corporation for carrying on said business without first having obtained a license or permit so to do. Defendant further states that the business of the manufacture, sale and distribution of ice is a private business and not clothed with a public interest; that such business is not carried on under the authority of a public grant, or franchise and does not render a public service; that said business does not exercise the right, and has not the power, of eminent domain, nor does it require the use of the streets and highways in any manner not used by the public at large; that such business is not injurious to the public health, safety or morals, but is a useful and necessary occupation; that ice is manufactured or sold in practically every city, town and community in the State of Oklahoma by sundry persons, firms and corporations; and that such business is not and has not been conducted in restraint of trade, and said business is not a monopoly.

9. Defendant further states and avers that the complainant is not engaged in the sale and distribution of ice to the public in Oklahoma City, State of Oklahoma; that all ice sold and distributed to the consumers in said city is sold and [fol. 10] distributed by the Oklahoma City Ice Company, a corporation, and that said complainant should not be permitted to maintain this suit.

10. Defendant further avers that said Chapter 147 Session Laws of Oklahoma, 1925, was enacted through the influence of and for the benefit of said complainant and other large ice manufacturing interests, in order to prevent competition in their business, and that said law is being administered solely in the interest of said complainant and other large ice manufacturing interests, by prohibiting

other citizens of the state from manufacturing, selling and distributing ice in competition with complainant and said others. That said act was not enacted as a police regulation to protect the health, safety, morals and welfare of the citizens of the state, and is not being administered as such.

11. Defendant further states that the complainant herein is without equity and said complainant is not entitled to the relief prayed for.

Wherefore said defendant prays that said complainant take nothing herein, and for judgment against said complainant, adjudging and decreeing Chapter 147 Sessions Laws of Oklahoma, 1925, unconstitutional, inoperative and void; for costs of suit, and for such other and further relief as the court shall deem just and equitable.

Geo. M. Nicholson, Solicitor for Defendant.

[File endorsement omitted.]

Duly sworn to by Ernest A. Liebmann. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

MEMORANDA OF DECISION ON MERITS OF THE CONTROVERSY—Filed June 24, 1930

The facts are the defendant sought to engage in the business of manufacturing and the distribution of ice in the city of Oklahoma City. In pursuance of this purpose he purchased a site and entered upon the construction of buildings suitable to house the machinery and appliances necessary to the proper conduct of this business. However, before he could complete his building, install his machinery and equipment necessary for the conduct of his business the complainant ice companies engaged in the business of manufacturing and selling ice in the city of Oklahoma City, and having, as shown by the proofs, practically a monopoly of that business in that city, brought the two above entitled and numbered suits for the purpose [fol. 12] of enjoining defendant from engaging in the manufacture and sale of ice in said city. The cases are

in legal effect and purpose sought the same; were tried and submitted together as one suit and will be so determined.

The alleged ground on which the injunctions are sought is that defendant has not applied to the Corporation Commission of the state of Oklahoma, paid the fee exacted and obtained a license for the erection and operation of his plant in said city as it is contended he must do before he can lawfully engage in the manufacture and sale of ice in the state of Oklahoma. While this is the alleged ground on which the complainants predicate their right to the injunctive relief sought, yet I have no hesitancy whatever in stating the true reason for the bringing of these suits is that plaintiffs may further their practical monopoly of the ice business in said city, because they did not invite and do not welcome from defendant competition in their business whether the same be beneficial to purchasers of ice dealing with them or not. While the legislation of the state, presently to be considered, relied upon by complainants, is a part of the anti-trust and anti-monopoly laws of the state, yet no person could hear and consider the proofs in these cases, as I did, and reach any conclusion but that such legislation in actual practice and operation tends of necessity to the creation and perpetuation of monopolies and to the destruction of all competition in the manufacture and sale of ice to consumers. However this may be, the question presented in these suits in this:

In the year 1925 the legislature passed an act entitled:

"An Act declaring the manufacture, sale and distribution of ice to be a public business, placing same under jurisdiction of the Corporation Commission; providing a license fee, and penalty for violation hereof."

This act of the legislature referred to is Chapter 147 Session Laws 1925, as follows:

"Be it Enacted by the People of the State of Oklahoma:

"Ice—Manufacture and Distribution

"Section 1. That the manufacture, sale and distribution of ice within the State of Oklahoma is hereby declared to [fol. 13] be a public business, as defined by Sec. 11032, of the Compiled Statutes of Oklahoma.

"Corporation Commission—License

"Section 2. That no person, persons or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license for such purpose from the Corporation Commission of the State of Oklahoma. The license fee hereunder shall be the sum of fifty cents (50¢) per ton, per annum, of the daily capacity of ice manufactured, sold or delivered, but the minimum license shall be five dollars ($5.00).

"Section 7. Any person, firm or corporation who shall engage in the business of manufacturing, selling and distributing ice or engage in either of said businesses, without first obtaining a license, provided for herein, shall be guilty of a misdemeanor and any such person shall be punishable by a fine not to exceed twenty-five dollars ($25.00), and each day's violation shall constitute a separate offense; provided, the Corporation Commission is hereby authorized to promulgate general orders not in conflict with this Act, and to enforce such orders against any person, firm or corporation, manufacturing, selling or distributing ice or engaging in either of said businesses, by imposing a fine for the violation thereof not to exceed five hundred dollars for each of said violations."

Now, Section 11032 of the laws of Oklahoma referred to in section one above quoted, reads, as follows:

"Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or ordered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or [fol. 14] by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render

its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

Now, it will be noted the Supreme Court of the state of Oklahoma in Oklahoma Gin Company v. State, 63 Okla. 10; 158 Pac. 629, holds section 11032 was *construed* by the Supreme Court of the state as including only those businesses so conducted as to violate the provisions of section 11017 Compiled Laws of Oklahoma. Section 11017 of the Compiled Laws of that state reads:

"Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal."

In Shawnee Gas & Elec. Co. v. Corporation Commission, 35 Okla.; 454 Pac. 127, quoting approvingly from an unpublished opinion of Hayes, Justice, said:

" 'This section provides that whenever a business shall have certain characteristics, it shall be a public business, and shall be subject to the jurisdiction of the Corporation Commission to regulate its practices, rates, and prices; but it does not provide that all public business shall be subject in these respects to such jurisdiction. * * * The first part of said section attempts to define the class of business which the latter part of the section subjects to the jurisdiction of the Corporation Commission and the district courts. It appears to us clear that what was intended was to bring within the jurisdiction of the Commission the regulation of charges and rates for services connected with those businesses that violate the Acts and are connected, not with business strictly of a public character, such as common carriage, supply of water and gas, but with that class of business in which the owners, without any intent of public service, have placed their property in such a position that the public has an interest in its use. The distinction between the class of business and [fol. 15] its service intended to be defined by and included in said section and the business and service of public corporations, is we think, well made by Mr. Justice Brewer,

who delivered the opinion of the court in Cotting v. Goddard, 183 U. S. 72, 22 Sup. Ct. 30, 46 L. ed. 92, in the following language: "In the one (referring to property devoted to public service) the owner has intentionally devoted his property to the discharge of a public service. In the other, he has placed his property in such a position that willingly, or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself; in the other, that he submits to only those necessary interferences and regulations which the public interest require." It was this second class of business with which we think Section 13 was dealing and intended to place under the jurisdiction of the Corporation Commission and the district courts of the State as to all practices, rates and charges. * * * The Act confers not only upon the Corporation Commission jurisdiction to prescribe rates and charges under the conditions therein named, but confers also a like concurrent power upon the district courts of the State.'".

So limited as was done in this case by the Supreme Court of Oklahoma there can be no possible objection to this legislation under consideration. But, if we treat this legislation as broadly declaring all manufacturing and distribution of ice plants to be public utilities because so declared by the law making power of the state, and this is the contention made by complainants in these cases, far different and far more difficult questions arise. The question then presented arises over the power of the law making branch of the state, regardless of the circumstances and conditions, but its mere ipse dixit to make all ice manufacturing plants public utilities, conducting a public business, entirely at the beck and call of the Corporation Commission of the state. I cannot agree with this position and for the following reasons.

[fol. 16] The law making body of the state or nation does not possess the power to make a thing in name what in

fact and its essential nature it is not. It has often been declared in decisions controlling here, a state by its legislation has not the power of declaring a business to be a public utility or a business affected with a public use, and thus controllable, as seen fit, by the law making power which in its true nature is not such a business. Thus, in the case of Lawton v. Steele, 152 U. S. 135, Mr. Justice Brown, delivering the opinion for the court, said:

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In Wolff Co. v. Industrial Court, 262 U. S. 522, Mr. Chief Justice Taft, delivering the opinion for the court, said:

"It is urged upon us that the declaration of the legislature that the business of food preparation is affected with a public interest and devoted to a public use should be most persuasive with the court and that nothing but the clearest reason to the contrary will prevail with the court to hold otherwise." (Citing several cases.) "These cases are not especially helpful in determining how a business must be devoted to a public use to clothe it with a public interest so as to permit regulation of rates or prices. * * * "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early [fol. 17] common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but now-

adays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances. * * *

"It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.' All business is subject to some kinds of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation, is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction. We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses, noted above, because even so, the valid regulation to which it might be subjected as such, could not include what this act attempts.

To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

[fol. 18] In Tyson & Brother v. Banton 273 U. S. 418, Mr. Justice Sutherland, delivering the opinion for the court, said:

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowing as strictly denoting 'a right', that synonym more nearly than any other expresses the sense in which it is to be understood. * * *

"And, finally, the mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry."

In Fairmont Co. v. Minnesota, 274 U. S. 1, Mr. Justice McReynolds, delivering the opinion for the court, said:

"The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil-highbidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

Quoting from Adams v. Tanner, 244 U. S., 590, the court continues:

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no [fol. 19] profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found

quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

From the foregoing cases controlling here, if complainants contend the law making power and declared an ice manufacturing plant and the distribution of ice therefrom within the territorial limits of the state of Oklahoma, (in the light of other statutory enactments heretofore alluded to) is a public utility, and they further contend such declaration is binding and conclusive regardless of the true nature of the business conducted, such contention must be denied. On the contrary, it must be held whether an ice manufacturing plant and the distribution of ice therefrom is a public utility business, is a question of law for the court, and if it be a public utility in a certain sense, the nature and the extent of the regulation imposed, whether reasonable and necessary or unreasonable and arbitrary, under all the facts and circumstances of the case, is further a question of law for the court. Now, under the proofs in the instant cases it is clearly shown the act of the legislature here under consideration in its actual operation and effect has had the result in many cities and towns of the state of absolutely destroying all competition in the manufacture and distribution of ice. It further appears the act has had in actual operation the effect of enhancing the price charged by the ice plants to the consumers of ice when and where competition has been eliminated. While it is shown there are more ice plants engaged in the business of manufacturing and distributing ice in Oklahoma City than there were at the date the statute was enacted, yet while there are more plants there are less owners of these plants. Again, while it does not appear from the proofs in these cases that the true motive and intent of these suits is to obtain an injunction decree against the defendant because the operation of his plant will bring [fol. 20] competition with complainants, yet, judging the complaints by the same rules we judge ordinary business

corporations it must be true complainants would not invite the competition the operation of defendant's plants will bring them. It must be true some reasonable competition in the manufacture and distribution of ice in Oklahoma City will result to the benefit and not the detriment of the population of that city. The manufacture and sale of a commodity such as ice is a useful and honorable private business and calling in which any citizen so disposed has the undoubted right under our Constitution and laws to engage by investing his capital and selling his time and energy, at any time, and in any suitable and convenient place his judgment may dictate to him. If he builds up a monopoly and his charges for his product become excessive or exorbitant and he is not induced to reduce them by competition, I have no doubt as to the power of the state to correct such abuses, but such is not the power of regulation attempted to here be imposed. In these cases defendant has devoted his money to the purpose of the construction and operation of an honest, legitimate, personal manufacturing business in Oklahoma City, a project one would believe any such young, industrious, wide-awake growing city as Oklahoma City would welcome with outstretched arms and glad hearts. In attempting this business, at the very threshold of his endeavor complainants arise and inform him he may not engage in his chosen occupation in Oklahoma City unless and until he makes his application to the Corporation Commission of the state and pays for and procures permission in the shape of a license from that body to engage in such personal business within the state, no matter whether the people of the city much desire this new enterprise to be conducted in their city or not. Now, the very power that requires defendant to petition the Corporation Commission of the state to grant him a permit in the shape of a license to conduct this business, embodies the power, if such license is lawfully required, to forever exclude him from the conduct of such business. Not only that, if he has the hardihood to proceed without the license, to subject him to extreme fines and penalties as a law breaker. To my mind, to uphold such legislation in cases of this character, brought and conducted from the indisputable motives, and under all the facts and circumstances of these cases, would be as said [fol. 21] by the great and wise jurist, Mr. Justice Bradley,

"This will be running the public interest argument into the ground." And, as said by Mr. Chief Justice Taft "It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment."

It follows to my mind, the bills of complaint are without equity and must be dismissed for that reason.

It is so ordered.

John C. Pollock, U. S. District Judge.

June 23rd, 1930.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DECREE—Filed June 24, 1930

On this the 22nd day of May, 1930, the above entitled cause comes on for trial on its regular order pursuant to assignment, was tried, submitted and taken under advisement.

On June 24th, 1930, the court, on further and final consideration of the pleadings, the evidence introduced and stipulations made by the parties, finds the issues in favor of the defendant and against the complainant; that the Act of the Legislature of the State of Oklahoma, of April 7, 1925, being Chapter 147 Session Laws of Oklahoma 1925, is unconstitutional and void, and that the complaint of the complainant is without equity and should be dismissed with prejudice.

It is Therefore Considered, Ordered, Adjudged and Decreed by the court that complainant's bill of complaint be, and the same hereby is, dismissed, with prejudice, and that the defendant have judgment against it for cost.

To all of which the complainant excepts and exceptions are by the court allowed.

John C. Pollock, Judge.

O. K.

Everest, Dudley & Brewer, Andrews & Aston, Rainey, Flynn, Green & Anderson, Solicitors for Complainant; Geo. M. Nicholson, Owen & Looney, Solicitors for Defendant.

[File endorsement omitted.]

[fol. 22]. In United States District Court

Statement of Evidence under Subdivision (B), Equity Rule 75—Filed Nov. 13, 1930

The following is complainant-appellant's condensed statement, in narrative form, of the evidence introduced upon the trial, made in pursuance of Subdivision (b) Equity Rule 75, and lodged in the Clerk's office for examination of the defendant, as provided by said Rule.

The court held the burden was upon the defendant and he thereupon introduced the following evidence, and rested:

Evidence of Defendant

The defendant, Ernest A. Liebmann, (p. 3) testified that he was a resident of the State of Oklahoma; had been such for 41 years; had been engaged in the ice business since 1903 in Oklahoma and Texas; that in 1903 he was engaged in the ice business in Hobart, Sulphur and Oklahoma City; that at the time the present ice law was passed he had a plant in Oklahoma City; there were eight plants in the city then; the plaintiff, New State Ice Company, was one of them; that he knew of no agreement among the companies to manufacture and sell ice at a certain price prior to the passage of the act; that eight of the plants in the city were owned by six companies; that there are eleven in Oklahoma City now; they are owned by three companies; the price of ice prior to the passage of the act was hard to fix; there were different classes of trade; different prices; that prior to passage of the Act witness sold for 60¢ cash delivered; 57½¢ per hundred where they took coupons; and 40¢ per hundred at the dock; sold to dairymen for 30¢; that companies in Oklahoma City were generally along that line in price, but there was no agreement; cash trade delivery in Oklahoma City now was practically the same price as before; coupon books are 55¢ per hundred in place of 57½¢; dock prices are the same, except out-lying towns that are selling now for 50¢; country town delivery and dairy delivery are now 35¢; some factories have recently raised their dock prices from 35¢ to 40¢ per hundred pounds; that the plant he had built would be called somewhere between 25 tons and 30 tons; that he had spent

approximately $40,000.00 in building it; did not know just the date of the lawsuit; that he was ready to operate the [fol. 23] 1st of May,—used two men in operation—one day and one night man; that it did not require any unusual skill in a modern raw water electrically driven plant to operate it; that in distribution of ice between 30 and 40% is sold at the docks in 12-25-50 and 100 pound chunks; they drive up and get it; other ice hauled out in wagons and trucks; they put the streets to no greater use than any one else; that ice can now be manufactured cheaper than it could in 1925; electric power has been reduced some; equipment is simpler to operate; you can handle more ice with an electric hoist than before; ice business is merely manufacturing and selling a product; witness could see no difference to the general business than from a butcher or grocer or baker; that ice would stand shipping in a refrigerator car considerable distance—100 or 125 miles if it is loaded just ahead of the train that moves it; freight rates on ice are from 8¢ to 10¢ per hundred pounds on distances of 50 or 60 miles; there is considerable trucking of ice from one place to another; a privately owned mechanical refrigerator uses a different refrigerant than witness—they used sulphur-dioxide; that there is no material difference between a commercial ice plant and a home refrigerating plant; that the principle is the same, and both are simple in their construction and operation; that there were a good many individual ice plants in Oklahoma City and other cities of the state; that hotels, restaurants, meat markets and hospitals often have their own plants; lots of dairymen do.

Cross-examination:

On cross-examination witness testified that he did not believe as many hotels and large buildings had individual light plants or water plants as had ice plants; that witness had testified solely in regard to conditions in Oklahoma City; he could not say whether there were more than 6 competitive points in the entire State of Oklahoma so far as regards the manufacture and sale of ice in 1925; that he did not believe there were as many as one-third (⅓) of the ice plants in the State of Oklahoma, in 1925, owned by the electric power companies; that in his judgment $1500.00 a ton capacity would erect a raw water ice plant;

that there was not much difference in the price of ice equipment now and the price prevailing in 1925; that he started making ice in Oklahoma City in April, 1925; the other points he had been in were Hobart and Sulphur; the [fol. 24] restrictions on prices in such places as this were another man might ship in ice or put up another plant; that you could ship ice a distance of 50 or 75 miles in a car, put it in cold storage and compete with the man on the ground; of course, it was not practical to do it, but it could be done; the distance that ice could be carried in a truck and delivered would depend on the roads and the season of the year; with ice overweight 10%, by carefully covering it, it could be delivered to customers over a period of three or fours hours before melting so that a customer would lose no weight; prior to 1925 some ice men sent out scored ice; some did not; he did not recall any place where there was any material difference in the price of ice in competitive points prior to 1925.

O. W. Bartell (p. 24) called by the defendant testified that he was engaged in the dairy business three miles East of the Capitol building on 23rd Street; that he bought ice prior to 1925 at 25¢ per hundred pounds at the docks; the ice companies deliver it at his door at present for 40¢ per hundred; that he knew nothing of any agreement prior to June, 1925 as to prices among ice manufacturers; formerly he bought at the docks where he could buy cheapest; that there were probably three plants soliciting his business in 1925; that he did now know the Corporation Commission was regulating the price of ice in Oklahoma City prior to 1925.

Defendant thereupon introduced T. F. Hurt (p. 28), who testified that he lived at No. 1608 West 35th Street in Oklahoma City, Oklahoma, and was in business at No. 420 West Grand Avenue; had been a dairyman about 20 years; prior to June, 1925, he paid $4.00 a ton for ice at the docks from the New State, the Crystal and the Big Four plants; at present he made his own ice; he started making his own ice because the price was raised from $4.00 to $7.00 a ton after this law went into effect.

R. D. DAVIS was introduced as a witness (p. 30); stated he was a Ford dealer in Bethany, Oklahoma; had been in the ice business in '24 and '25 maybe; that he did not manufacture ice but bought ice from Mr. Liebmann and the New State Ice Company in Oklahoma City; prior to [fol. 25] the passage of the Act of June, 1925, he paid 30¢ a hundred at the docks; that the next Spring he paid 35¢ a hundred; that at present ice in Bethany, Okla., sold for 60¢ a hundred delivered and 50¢ at the docks.

Cross-examination:

On cross-examination testified that he did not know the Corporation Commission fixed the price of ice prior to 1925; that the price in Bethany in 1924 was 60¢ delivered; that he sold out to Mr. Anderson.

JOE BRASIER (p. 35) was thereupon called by the defendant. He testified that he lived at 428 Southwest Eleventh St., in Oklahoma City; that his business was salvaging old cars; that from 1910 to 1928 he was in the ice business buying wholesale and retailing to customers; that prior to June, 1925, he paid 25¢ a hundred for ice at the manufacturers' docks, and bought from the Big Four, the Crystal Ice and Ice Cream Company, and New State; that after June, 1925, he paid 35¢ a hundred.

S. B. FARNHAM (p. 37) was thereupon called. He testified that he had been in the ice business for 15 years in Iowa; from his experience he thought ice could be shipped from 50 to 75 miles in a good, tight, refrigerator car; was not acquainted with conditions in Oklahoma; could not see any material difference between manufacturing and selling ice and the preparation and sale of meat, or the baking and selling of bread; that nothing was used in the manufacture of ice that was injurious to public health; knew nothing about the business that was injurious to the public welfare or morals; did not require expert skill to operate an ice plant; a man of average intelligence can learn to operate a plant; (Cross-Examination) that he had applied to the

Corporation Commission to install an eighteen ton plant; that he never did ship ice 50 miles by freight, handle it twice, put it in cold storage and sell it in competition with a man manufacturing ice in the town.

GEORGE WINCHELL (p. 41) called by the defendant, testified that he had lived in Oklahoma City for 10 years; was em- [fol. 26] ployed by Sherman Machine & Iron Works as refrigerating engineer; that his employers were agents for ice making or refrigerating machines; that the process of manufacturing ice was chilling water to freezing point, and some system of agitation, in the case of raw water, to make it freeze clear; that there was nothing in the machinery or in any ingredient placed in the water that was injurious to the public health; that there was a slight decrease in the price of ice manufacturing machinery since 1925, but the machines had been simplified; that many big establishments manufactured their own ice; that he could see but little difference between the sale and delivery of ice and other manufactured products—for instance, meat might spoil; ice just melts.

Cross-examination:

On cross-examination he testified that his concern manufactured any kind of cast iron products, and were agents for ice machinery of the Frick Company of Waynesburg, Pa.; that the Frick Company sold the defendant Liebmann his plant; that ice is largely used to preserve food products; did not know the extent that ice was used in the State to preserve perishable foods and things of that nature.

OFFER IN EVIDENCE

Thereupon the defendant offered certified copy of the license issued to complainant by the Corporation Commission, which is in words and figures as follows:

"Duplicate

(Great Seal of the State of Oklahoma)

No. 736

State of Oklahoma, Corporation Commission

Ice License

Manufacture, Sale and Distribution

Know all men by these presents that Southwest Utility Ice Company of Oklahoma City, a corporation, having filed application for license to manufacture, distribute, and sell ice in the State of Oklahoma at Oklahoma City, and having shown that it is entitled to license as prescribed by Chapter 147, Session Laws of 1925.

That said Southwest Utility Ice Company is hereby authorized and licensed by the Corporation Commission to manufacture, distribute and sell ice in the State of Okla- [fol. 27] homa, at Oklahoma City, from July 1, 1929, to June 30, 1930, inclusive.

In witness whereof the Corporation Commission has caused this license to be signed by its Chairman and attested by its Secretary and its seal affixed thereto, this the 20th day of July, 1929.

Corporation Commission, C. C. Childers, Chairman.

Attest: E. D. Hicks, Jr., Secretary."

DEMURRER

Complainant interposed a demurrer to the evidence introduced by the defendant, and the court reserved ruling thereon.

The complainant introduced the following evidence and rested.

EVIDENCE OF COMPLAINANT

The plaintiffs then called as their witness W. P. HILL (p. 52) who testified that he was engaged in ice manufacturing; had been connected with the industry eleven years; that since the Fall of 1919 he had been Secretary of the Oklahoma Ice Manufacturers Association, and was acquainted

with the conditions pertaining to the industry prior to June, 1925; that as Secretary of the Association, and prior to June, 1925, they were having many complaints as to abuses in the industry from different communities all over the State; that the Ice Manufacturers Association had organized to attempt to correct that condition; numerous complaints had been filed before the Corporation Commission and hearings had; many of the complaints were informal; in 1921 the Corporation Commission cited every ice manufacturer in the state to appear and show causes why its practices should not be regulated by the Commission; that from 1919 until the date of the passage of the present ice law, practically the sole function of the secretary of the association was to investigate these complaints and try to adjust them with the complainant and the local manufacturer; that the nature of this abuse was largely discrimination in service, insufficient weight and a great many complaints as to prices; that the Corporation Commission began to exercise jurisdiction over prices prevalent in vari-
[fol. 28] ous communities long before the passage of the present act and prior to 1919; there was in effect in 1911 a general order, identified by witness as Exhibit One, and afterward in 1921 there were various other orders made for the purpose of correcting abuses existing in the industry in the way of short weights and so forth; nearly all of the time of witness was given in an effort to correct these abuses during the season in which ice was sold; the matters before the Commission were usually set down for hearing on Tuesday of each week; the witness would ordinarily spend that day in his office and before the Commission, and the balance of the week would be out in the communities trying to adjust complaints; that witness continued to act as secretary of the association since the passage of the Act of 1925; a general order governing the ice industry was issued by the Corporation Commission of the State after this bill became effective; that in 1921 a general order had been issued that was identified as plaintiffs' Exhibit Two, which was order numbered by the Commission No. 1906; this order was appealed by the ice companies that were resisting any attempt to regulate them; supersedeas was allowed in the appeal taken; the Supreme Court sustained the Commission in the case that is reported in 96 Oklahoma

Reports, page 19; Exhibits One and Two referred to by witness are as follows:

PLAINTIFFS' EXHIBIT 1

"BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

Cause No. 1397. Order No. 505

In the Matter of Proposed Order No. 94 to the Moss BREWING COMPANY, NEW STATE BREWING ASSOCIATION, OKLAHOMA CITY ICE & COLD STORAGE COMPANY, PEOPLES ICE & FUEL COMPANY, WESTERN ICE COMPANY, CENTER FREEZE ICE COMPANY, CRYSTAL ICE COMPANY, STEFFENS & BRETCH ICE & ICE CREAM COMPANY

The proposed Order herein was issued for the purpose of requiring all parties delivering ice in Oklahoma City to secure a permit from the Corporation Commission before any manufacturer or ice producer can sell or deliver ice to such parties for local distribution in Oklahoma City.

At the hearing most of the ice companies above mentioned [fol. 29] were represented. No objections being offered to the proposed Order, the Final Order is hereby issued.

It is ordered that the Moss Brewing Company, the New State Brewing Asso., the Oklahoma City Ice & Cold Storage Co., the Center Freeze Co., the Crystal Ice Co. and Steffens & Bretch Ice and Ice Cream Company shall not deliver ice to any person to be delivered for local consumption in Oklahoma City who shall not have a permit issued by the Corporation Commission to such person.

That permits authorizing any person to deliver ice locally in Oklahoma City shall be issued without charge to any one that may apply. The only qualification for such permit is honesty. This will be presumed by the Commission until the contrary is shown by the holder of such permit in delivering ice.

Such permits are subject to be revoked by the Commission upon the holder thereof wilfully delivering a less quantity of ice to consumers than the amount paid for, that is approximately less—a variation of two or three pounds either way on a 25 pound block; three or four pounds on a

50 pound block; or four or five pounds on an 100 pound block will not be considered a violation of this Order.

That said permits may also be revoked by the Holder thereof wilfully tearing from coupon books more coupons than the amount of ice delivered.

No ice manufacturer or distributor in Oklahoma City shall employ any person to deliver ice directly or indirectly to any person for distribution who has one in their employ delivering ice that does not have a permit above described.

That in the event a permit is revoked, or an employe resigns, or it is necessary to hire new men, the ice company may employ any person not heretofore having had a permit for forty-eight hours; that such person within such period of forty-eight hours must apply to the Commission for a permit.

That each manufacturer or dealer in ice must supply all men delivering ice for them with a badge, the number thereon to correspond with the number of the permit held by such parties.

Each wagon shall be supplied with a pair of accurate [fol. 30] scales and upon the request of any consumer, the ice must be weighed, and the amount thereof reported to the purchaser.

This order shall be in full force and effect on and after the 6th day of August. 1911.

Oklahoma City, Oklahoma, July 27th, 1911."

PLAINTIFF'S EXHIBIT 2

"Order No. 1906. Cause No, 4299

To all persons, firms, associations or corporations engaged in the business of manufacturing, selling or furnishing ice, directly or indirectly, to the public in the State of Oklahoma, and to any and all persons concerned in proposed Order No. 170:

Finding of Fact, Opinion, and Order

In accordance with notice dated June 18, 1921, and published according to law, hearing on Proposed Order No. 170 was held at the office of the Corporation Commission in the State Capitol at Oklahoma City, Oklahoma, on July 13, 1921. There was a general representation of ice manufacturers

and dealers representing all parts of the State of Oklahoma. It was stated in support of the rules proposed to be promulgated that each of said rules and regulations was proposed for the reason that the wrongful practice or failure of good service sought to be corrected thereby had occurred within the State of Oklahoma and had been made the subject of formal or informal complaint to the Commission.

The attorneys for the respondent ice manufacturers and dealers were unanimous in their insistence that the record show their objection to the assuming of jurisdiction in the premises of the Commission, and formal pleas to the jurisdiction were offered by several. The same were overruled and the hearing ordered to proceed.

After numerous objections had been suggested as to the first of the proposed rules, and before any testimony was offered, it was suggested that a recess be taken and the respondents hold an informal conference for the purpose of agreeing, if possible, as to objections of any of the proposed rules or upon rules to be suggested in lieu thereof. The [fol. 31] Commission was invited to have a representative in this informal conference.

Upon resumption of the hearing attorneys reported the unanimous willingness of the respondents to adopt the proposed rules with certain changes which were suggested and submitted.

One witness was put on the stand to set forth the reasons the respondents desired to offer supporting the desired amendments to the rules as proposed. The testimony of this witness was offered as in behalf of all the respondents present. Notwithstanding a reminder to the Commission by one of the attorneys that he still objected to the jurisdiction of the Commission, there was a clear disposition on the part of the witness and of all the operating manufacturers and dealers present, to co-operate with the Commission in the fullest degree, to the end that the interests of the public and the respondents alike be fully protected in the proposed rules and regulations. It was urged that rules unduly burdensome in character must necessarily result in ultimate disadvantage to the public.

The Commission being fully advised in the premises finds that the rules and regulations proposed, with amendments as agreed to in conference, are in the interest of fair and adequate service to the ice consuming public of Oklahoma, and should be adopted and made effective.

Wherefore, the Commission having given full consideration to the foregoing facts and to all the facts in the premises, it is ordered that the following rules shall be adopted, and the same are hereby adopted, for the regulation and control of the business of distributing ice in the State of Oklahoma.

Rule 1. Ice shall be sold in units of 12½ pounds, 25 pounds, 50 pounds, 75 pounds, 100 pounds, 150 pounds, 200 pounds and 300 pounds, and in any amount above 300 pounds in cake lots to any person, without discrimination, who desires to purchase the same and is ready to pay the regularly established price therefor; provided, this rule shall not be construed to require sale to a competitior, nor to require any concern to sell at retail unless it is regularly engaged in the retail business; and provided, this rule shall not apply when such company's requirements for his, or its, regular trade; provided further, that this rule shall not [fol. 32] be construed to require sale of ice for re-sale in locality already supplied at a reasonable price.

Rule 2. All wagons or vehicles used for the delivery of ice shall be equipped with accurate scales for weighing the same.

Rule 3. All ice shall be weighed at the wagon, in purchaser's presence, without additional charge.

Rule 4. All complaints of short weight must be promptly and equitably adjusted with the customer by the distributing agency.

Rule 5. Delivery districts shall include all territory properly and reasonably includable in the business or residence district of the city or town served, regardless of the political boundaries thereof, and all purchasers within such delivery district shall be served without discrimination; provided, however, that where there is more than one person or company delivering ice in any city or town, different districts need be served by only one such person or company.

Rule 6. All ice offered for sale to the public for domestic consumption shall be clean ice, manufactured from pure water.

Rule 7. Drivers or deliverymen shall be courteous in their dealings with patrons and the public.

Rule 8. Any information requested by the Corporation Commission concerning the business or service involved in this order shall be furnished within the time specified in such request.

This order shall be in full force and effect from and after the 15th day of July, 1921, and shall remain in effect pending further order of this Commission in the premises and in this cause.

Done at Oklahoma City, Oklahoma, this 15th day of July, 1921."

Continuing his testimony witness W. P. Hill stated (p. 64) that after the passage of the present act there was a general improvement in the conditions of the business; that complaints are still referred to the office of the association by the Corporation Commission so that adjustment may be [fol. 33] made, if possible, without hearing; during the last year there was but one complaint that reached him; it was in the nature of a 'phone call to the Commission, and by the Commission referred to him; in the year 1924, prior to the passage of the act, he would say the complaints reached hundreds in number; since the passage of the act ice consumption and production were increased; in 1925, at the time of the adoption of the law, there were approximately 160 ice plants in operation in Oklahoma with 700,000 tons production; the tonnage has been materially increased, but the number of plants has not been increased more than 25; that shortly prior to the passage of the act, and since, the process of manufacturing ice has been changed; they were being converted from steam or distilled water plants into what is known as electrically driven raw-water plants; a considerable number of the steam or distilled water plants have been converted into raw-water plants; the cost of erecting a plant in 1925, as determined by hearings had before the Commission, was about $2500.00 per ton capacity; of course that varies with the character of the property upon which the plant was constructed, the nature of the equipment and so forth; at the time the law went into effect there were eleven or twelve communities in the state that had more than one ice plant; among these eleven or twelve there were five or six places that had no semblance of competition; in other words, the plants would sell their ice to a common delivery system; the delivering company would

be composed of men who owned and controlled the properties;; the ice manufacturing plants would continue to operate under their corporate names, but would be owned in fact by the delivery system; there were six or seven points where there might be said to be competition; figured on a basis of 2,000,000 population, for year 1920, something like 235,000 people were residents of competitive points, but in none of the places presumably competitive were there anything like substantial differences in prices—they were practically uniform; once in awhile there would be a flurry, ice would drop a little among certain classes of trade, and then go back again; the peddler system was in vogue in Oklahoma City and some other points; the peddler was an independent dealer; owned his own equipment—it might be a horse, or wagon, or truck; he would start peddling when it was the busy ice season, distribute where he pleased in [fol. 34] the nature of routes, but when the hot weather was over, the peddler would quit and leave the community without ice delivery, unless the established companies took it up where he left off; in other words, the peddler took the cream of the businss and quit with cooler weather; the public that wanted ice would have to look for another source of supply; that the Commission has established a requirement of twelve months delivery in any community where there is a demand for ice; as a general policy, before 1925 or passage of the present law, wagons were not equipped with scales, and but a very small portion of ice was scored; by "scoring" ice is meant that a block of ice to be delivered at 300 pounds is frozen at a weight of from 12 to 16 pounds greater; when the ice is taken from the storage room it is put through a machine with saws; these saws are set at measurements that conform to the weight of the block—one will go down the middle and there will be five that will score side-ways and measured according to cubic contents; they will embrace the ice with a cut of from one to two inches deep; one saw will make a hundred pound block; another a fifty pound block and so on; in other words, it divides the ice into correct and differing weights in proportion to the size of the block; prior to the passage of the present law there were not ten plants in the state with scoring machines; at present they all have it where the manufacturer has a rated capacity of twenty tons or more per day; this insures correct weight to the customer;

another abuse arising from peddling ice was the peddler would have coupons redeemable, of course, by himself; these coupon books were often sold and the peddler would quit his route and the customer was left without remedy; prior to the passage of the act of 1925 there were ice dealers in every little town of from four hundred to five hundred population—it might be that the butcher-shop or a merchant kept ice in his refrigerator box, and if people wanted it, they would go to the ice dealer to get it; often some two or three men would keep it; the business was unprofitable under those conditions and the service was poor; the dairy business has made such rapid strides in the state that by rule of the Commission ice manufacturing companies are required to supply the communities where manufacturers have a license, and they are required to take a license for these small communities; in all of the communities lying be- [fol. 35] tween points supplied from the factory by truck, ice is distributed to farmers upon the ground, and produce such as eggs, butter and milk are now being produced through the use of ice so that they reach the market fresh and saleable; it has increased the production of this kind of farm products to a marked degree; at some points, as at Ardmore, large concentration-buying points are established; they ship out car-loads of butter, chickens, eggs and milk under refrigeration every day; throughout the United States about 20% of the entire ice manufactured is used in moving food and dairy products to the market; the exact proportion used in Oklahoma is hard at present to determine, but the business has increased since 1925 in spite of the in-roads made by private refrigeration; there has been a general average increase of ice manufactured of more than 6% per year since 1925, notwithstanding private refrigeration; the cost of installation of private ice machines will range from $200.00 up to as much as you want to pay; private refrigeration was just coming into use in 1925; whatever growth it may have had has been since that time; since the passage of the Act of 1925 the trend of prices on ice sold in the State has been downward; there has been an increase in the use of ice for household purposes; there has been a decrease in the use of ice for butcher-shops, drug stores, etc., and as aforesaid, there has been a large increase in the use of ice in rural communities; the price of

domestic ice has been materially reduced; prior to the passage of the Act ice was sometimes sold for 25¢ a hundred to certain classes of trade, but it was what was known as "waste" ice—white or broken-up ice, that was sold at a large discount; of course, its refrigeration qualities were good as clear ice, but it could not be used for domestic purposes; it was often dumped in the cooling tower; where ice is delivered from wagons it is not profitable where the delivery amounts to less than 3,000 pounds per day per wagon; in order to give full weight, now required by the Commission, wagons are furnished with fresh ice every 2½ hours; usually this is accomplished through what is known as re-lay trucks that leave the plant with ice for each route at designated points; the re-lay truck meets the wagon, takes the shrunken ice, credits the driver with it and puts fresh blocks in the wagon; where larger blocks are used 3 hours may be sufficient; blocks come out of the plant [fol. 36] weighing from 312 to 320 pounts in order to allow for shrinkage; this system has been established since the passage of the act and is due largely to the requirement of the Commission for full weight; another requirement of the Commission is that regular deliveries must be made in the forenoon; however, special deliveries are made whenever required; prior to the passage of the present act deliveries were most irregular; at the present time the public demands a better service in the ice business than ever before; this is due largely to the activities of the women; ice associations are requested by different schools in the state, and especially normal schools, to send representatives to discuss refrigeration, and classes in chemistry and physics are brought down to the plants and shown through them and instructed as to the manner of manufacturing ice; that the public seems to consider that we are selling a service more than a commodity; that ice is used to render the service of refrigeration; that in 1925 out of the 705,000 tons of ice manufactured and marketed in the State of Oklahoma, a little more than one-third of the ice plants were owned by electric public service companies; the Southwest Light and Power Company, the Southern Ice and Utilities Company and the Oklahoma Gas and Electric Company all owned some plants; the Oklahoma Gas and Electric Company took over eleven plants in one group in 1925; when the law was passed the Public Service Company of Okla-

homa owned more than 21 plants; the Southern Ice and Utilities Company owned six or eight plants; the Southwest Light and Power Company owned seventeen or eighteen plants; the combination of ice companies and electric light plants began somewhere around 1913, and the electric light companies have constantly increased the percentage of their ownership since that time; of course, ice is a seasonable product; the ice season varies somewhat according to weather conditions, but people begin to use it generally from April 1st to April 15th depending on the weather; the peak of the season is reached about July 15th, and the ice season will normally close about September 15th, it varies, of course, somewhat, as the weather conditions vary; ice cannot be shipped any considerable distance and compete with the manufacturer; a car of ice will average 18 tons; in small communities the peak demand will probably be a ton and a half or two tons a day; a car of ice should last [fol. 37] about a week but for the shrinkage; the natural result is that towards the latter part of the week the loss in shrinkage is so great, and the block of ice becomes fragile and easily broken, so that he cannot furnish the quality or weight of ice that the manufacturer would and is bound to lose his trade; another thing, there has been no satisfactory way found to ship ice so that the blocks won't break in shipping; it is a product that should be got to the consumer as quickly as possible after its manufacture, and this has resulted from the supervision of the Corporation Commission; the average man in the ice business attempts now to obey the law and the orders of the Commission; this results partly from fear of fines and punishment and partly through a desire to co-operate with the Commission; plaintiff's Exhibit Three then introduced in evidence showed an increase in daily capacity of ice plants of the State from 5,045 tons in 1925 to 6,078 tons in 1928.

Cross-examination:

On Cross-examination witness testified that he was Vice-President of the Western Ice Company, Western Ice and Cold Storage Company, and Seminole Ice Company and on the Board of Directors of the Maude Ice Company; that he and his associates controlled fifteen (15) plants; witness was sure that the business would not have been conducted since 1925 as efficiently as it had been throughout the State

had there not been some force greater than a man's willingness to act that compelled the things done; that there was nothing in the law prior to 1925 that kept the ice manufacturers from doing what they had since the passage of the act, but it simply was not done; the Oklahoma Ice Manufacturers Association was composed of ice manufacturers and machinery people and those who had an interest in the business; where the ice plants are owned by public utilities they are not operated under a franchise; it was a side issue to the light business, but the operation of these plants entered into their rate hearings had before the Commission where there was combined ownership; the State Board of Equalization does not assess ice plants as such; but does assess ice plants owned by public utilities; witness had acquired a portion of his interest in ice property prior to the passage of the Act of 1925, and a portion had been acquired since; as Secretary of the Ice Association the greater [fol. 38] portion of witness' time was spent running down complaints and trying to adjust them between the manufacturer and the customer; trying to prevent discrimination; a part of his duty as secretary was to collect data on manufacturing of ice, methods of distribution and uses of ice, but at present the greater part of the work of the association is in the nature of home service work in carrying the message of refrigeration to the average home and instructing women how to use it, and how to keep their milk, butter and other perishable foods; this was made necessary because of the unusual growth in the use of ice; people today are using refrigeration that never knew the use of it three or four years ago; this is especially true of the laboring classes; of the farmer; and of the poorer classes of people; it is in this class of the business that the industry has grown; the loss to the manufacturer of ice in sales has been in restaurants and places of that sort—it has not been in the home; in some of the farm communities there is a five year program established for greater gain in dairy and food products; the ice routes are established in circuits—going from one community to another; out of Ardmore we have some six or seven and are adding more this year; these rural routes were not in existence prior to the passage of the present law.

CAMPBELL RUSSELL (p. 99) testified he lived in Oklahoma City, and from the years 1917 to 1922, inclusive, had been a member of the Corporation Commission of the State of Oklahoma; that during these years the Commission exercised general jurisdiction over the ice business in the State with reference to rates, practices and service; that in October, 1918, the Commission in their annual report transmitted a letter to the Governor with reference to the acts of the Commission and their recommendations; that as to the ice business they said (p. 100):

"The ice business of manufacturing and distributing ice is as much a matter of public concern as is the business of rendering water, electricity or gas service, and should be subject to the same regulation. Complaints are constantly being made to the Commission in reference to the prices of ice, practices of ice companies or service rendered by such companies, and the Commission has frequently been called upon to exercise jurisdiction under the so-called Anti-Trust [fol. 39] law. Specific legislation should be enacted in reference to these companies, and the power of regulation should be made definite and certain."

The occasion for this recommendation was that the Commission felt their power should be made more definite; that the things that brought to the Commission's notice the need of this sort of legislation were complaints of neglect of service, short weight, poor quality of ice and prices that were considered unfair; that from time to time they had ice companies cited before them relative to prices; in the Message of 1915 and 1916, prior to his term of office, the Corporation Commission of that date had suggested to the Governor under title "Scope of Legislation" the following (p. 101-102):

"Pertaining to those utilities which serve the public generally should be broadened. Two conspicuous examples are ice plants and cotton compresses. Chapter 93, Session Laws, 1915, extend the jurisdiction of the Corporation Commission over water, heat, light and power plants, but does not include ice plants. Numerous complaints are received by the Commission each year as to exorbitant prices of ice companies and exorbitant prices charged. The same jurisdiction should be given the Cor-

poration Commission over ice plants as it exercises over gas, electric and water companies."

Another letter was identified by the Commissioner that it was agreed by counsel was in terms substantially the same as the two other letters, except that it contained the specific statement that complaints had been received from more than one hundred citizens and towns in the State.

Cross-examination:

That the regulation effected, prior to the passage of the present ice law, was under the Anti-trust Act.

L. J. LAHMAN (p. 105) testified that he lived in Oklahoma city, and had been in the ice business since the Winter of 1923; was assistant general operating manager of the Southwest Utility Ice Company; that he had been engaged in the manufacturing as well as the delivering end of the business prior to the time he had been assistant manager; [fol. 40] he had managed properties in Kansas, and was manager of the City Ice Company of Enid, Oklahoma, at one time; last year was in charge of distribution and sales of ice in Detroit, Michigan; that he was familiar with the price of ice in Oklahoma beginning with the year 1925 until the year 1930; that the compiled average figures on the State show as a whole a decrease in the price to the consumer; that Complainant's Exhibit 5 was taken from the prices of retail ice, as shown by the records of the Corporation Commission; that the amount saved to the consumer, as shown by these prices, for the various years was as follows:

1926	1927	1928	1929
$55,279.04	$89,715.24	$287,260.80	$328,223.80;

that the estimated saving for 1930, based on 715,000 tons production, would be $414,700.00; that the operating season of the ice business in Oklahoma has averaged 116 days in the 365, or 32% operating season out of the year; the comparative production by way of illustration for the month of January, 1928, was 2.31% of the total for that year; the reductions made were generally on request or

order of the Corporation Commission; that the effect of the act had not tended to combine the ice plants in Oklahoma to a greater extent than combinations were carried on in other states; that the same merging operations were going on in just as large proportion without the law; that in 1925, in compliance with the law, schedules were filed for towns without manufacturing plants, and rural communities and rural routes affecting 378 places; that in 1930 there had been filed with the Corporation Commission 769 schedules covering the same class of locations; an increase in the rural portions of the State of more than 100% coverage; that the first attempt at the operation of rural routes in the State was in 1924; that with the protection given by the present ice law companies could undertake distribution in the rural communities that would be impractical without; the result of the rural service had been to increase the production of milk, butter, fresh vegetables and eggs for the farmer could preserve his products until he could get to market with it; that the dairy business had been developed extensively; specific instances might be cited in cities of Hobart, Enid and Ponca City, all in Oklahoma, where the availability of ice had built up a large [fol. 41] dairy trade, supplying it not only for local demand but in sufficient quantities for cheese factories and as a collecting point for cream stations; that Swift and Armour have started plants there within the last two or three years, and the same is true as to many other cities and towns throughout the State; the growth having been subsequent to the passage of this Act; an examination of the records of the Corporation Commission showed that in the State of Oklahoma, prior to the passage of the 1925 ice law, there were but seven towns in the entire state that had more than one ice plant; there had been two in Guthrie; one had gone bankrupt; there had been two in Pawhuska; one had gone bankrupt; in Ponca City there had been two, but they had merged, and the plant was still operating; there was no change in the price of ice at any time because of the building of another plant; whether there were two or more plants the price in the points where these plants were was uniform; that there were numerous towns in the State, prior to the passage of the Act, suffering severely from the conditions existing; the operators of plants were indifferent to the wants of the public, and were interested only in

squeezing the most profit from the operation of their plants; they were inconsiderate of the convenience of their patrons and their prices were exorbitant; they made no *no* effort to control delivery of proper weights, and attempted to economize so greatly on delivery operation that the housewife frequently had to stay at home until five or six o'clock in the afternoon uncertain as to when the ice man would come; that conditions have materially bettered since the passage of the Act; that the Commission has forced all ice men to install scoring machines in plants exceeding 20 tons capacity that practically eliminated the cutting of short weight ice; the fines that have been imposed have kept the Manager and producer on their toes; delivery is completed today not later than 2 or 3 o'clock in the afternoon because he knows complaints on service will be reported to the Commission and he will have to answer for it; the basis for establishing the price of ice under any circumstance is the cost of producing and delivering; duplication of manufacturing equipment and delivery equipment, and expenses of delivery, necessarily makes for high prices; it is also necessary for those operating in the same community to maintain the price of ice high enough to cover the cost of investment or one [fol. 42] or the other will go broke; with these conditions existing at some time the public will have to pay the exorbitant price; that a large percent of the ice manufactured and sold goes to the preservation of food; in Oklahoma City in the month of April, the present year, the delivered sales were to the retail trade 21.14 per cent; delivered sales, commercial, to stores, restaurants, and businesses of like nature, 37.12 per cent; of the platform sales 24.9 per cent of the total was sold to those who took ice to their homes; 13.81 per cent was sold to the wholesale trade; car-icing was 2.92 per cent; the remainder, about 9/10 of 1 per cent of the total, was car load shipments out of town; in the summer time more than 50% of the delivered retail trade goes to the home; approximately 15% to 20% of the ice manufactured in the State of Oklahoma is consumed in the refrigeration of food products in transit either from the State out or in transit through the State.

Edwin Dubarr (p. 128) testified that he lived at Norman, Oklahoma; had been connected with the University of Ok-

lahoma from the year 1892 to 1923; had been the head of the Department of Chemistry, and at times Dean of Pharmacy; had a part of the time been State Chemist for Public Health and Food Commissions; that he had made a study of the use of ice as applied to perishable fruit products and also to health conditions of the state; that it conserves the food products by saving them and keeping them in a good, usable condition for a longer time; that it conserves the health in furnishing suitable foods for the body and in the cure of disease; that ice bears a very important relation to the dairy business and was necessary in keeping milk, cream, butter and cheese at temperatures necessary for its preservation; that the use of ice in a general way not only helps the baby, but it helps the aged, and those between the baby and old age; that the growth and development of the production of perishable food products in recent years in Oklahoma has been very large due to the use of ice; that ice was *no* necessary that it was not only indispensable but absolutely a necessity in the summer time for the preservation of food products and milk to be use- for infants; that in the campaign for milk and ice for the babies that goes on every year in this state, he not only assisted in begging for it, but would almost steal; under present conditions [fol. 43] a household cannot maintain itself and keep its food in decent condition without plenty of ice or refrigeration; that cold water from a spring might be a good substitute, but not as good; the only place to get water cold enough was somewhere like Yellowstone National Park, where the air comes out of the earth at 37°; that in the majority of cases ice is an absolute necessity for health and keeping food in a decent condition.

Cross-examination:

The protection of babies makes it necessary to keep their food and milk at proper temperatures, and the temperature around a child is important; warm milk, unless it comes from the mother's breast, is not good for the child; ice is not more important than milk, but if the milk had soured it is of no use for babies; that he had been studying chemistry for more than 50 years; that even as a boy he had found that food would spoil if you did not have ice to preserve it.

L. C. SMITH (p. 134) testified that he was Secretary of the National Association of Ice Industries, and had been such for 13 years; that about 84% of the ice produced in America was manufactured by members of his association; based upon actual tonnage reports from members of his association, taken from the nation at large, the ice business for the last eleven years had increased upon an average of 5.35 per cent per year; that in 1914 there was in the neighborhood of 2700 ice plants in the United States; at present something in excess of 6200; the growth had been under two classifications—one in congested cities; the other in the development of perishable products in southern countries, California, Arizona, along the Rio Grande Valley, Alabama, Mississippi, and Florida; these two had shown the most marked development; the consumption of ice by retail domestic consumers during these years had largely increased; statistics showed that 29% of the ice manufactured or produced went to the domestic consumer in 1919; in 1929 47% was consumed by the domestic consumer; in 1919 the per capita consumption of ice was 712 pounds; in 1929 it was 1157 pounds per capita, taking the nation at large.

[fol. 44] A. J. AUTHENRIETH (p. 140) testified that he was a refrigerating engineer; had been since 1896; was now in the operating and construction department of the Middle Western Utility System, and had about 300 plants under his supervision located in fourteen different states; that he had made a very extensive study of the use of ice in the transportation of food products throughout the United States; that attempts had been made to find a substitute for ice; that the attempts were unsuccessful; that the merchandising of ice differed from the merchandising of other food products in that it was a perishable product, and it must evaporate in order to work or obtain its refrigerating effect; it must be put to use soon after it is manufactured in order to get the effects of it; it is a very perishable product and cannot be kept in storage for a long time, except at very low temperatures; in other words it should be marketed as it comes from the freezing vats; that delivery by wagon to the domestic trade is limited to a radius

of from 12 to 15 miles; that it could not be shipped without ruinous loss over 50 or 75 miles; if it is to be used for domestic purposes after shipment it must be immediately unloaded and put in a room cooled below 28°; that the manufacture of ice is a rather a highly specialized business; in order to produce ice in any plant there are three distinct systems; the ammonia system, the air system and the water system in what is known as the raw water plant; if it is a steam plant you have ammonia system, and water system and steam system; the production of merchantable ice is a highly specialized thing; water and air have all to do with the quality of ice you are going to produce; the water must be specially treated if it comes to your home free from bacteria; if you get water from city mains it may be so highly mineralized that you cannot make a clear block of ice out of it; it requires then special air treatment; the manufacturer of ice machinery does not look after this; the ice machine manufacturer will guarantee to build you a plant that will produce 20 tons of ice a day; a clause provides that if the water needs treatment, you must furnish the equipment –they do not guarantee the quality of ice; ice is more of a chemical proposition than an engineering problem; if you don't have proper treatment of the water and proper air agitation, you make white blocks of ice; the cost of building a plant will vary in ton capacity in various localities; it runs from $1750.00 a ton to $2500.00 [fol. 45] a ton, depending upon local conditions entirely; about 20% of the entire ice produced is now used in the preservation of food and food products in transportation; ice is the conservator of the nation's food supply; without ice we could not exist; in the large cities, like New York and Chicago, in the Winter months they are dependent on California, Arizona, Texas, Florida and the South Atlantic states for their Winter fruits and vegetables; without ice they would be deprived of these during the cold months of the year; in Texas and California, and the South, when the supply of vegetables has moved North and the crops are done in the South, the reverse operation takes place, and they get their vegetables from the Northern States under refrigeration; that actually covers America as such; that in 1922 there were loaded in Oklahoma 1676 cars of food products under refrigeration; in 1925, 2940 cars were so used, and in 1929, 3347 cars were so used;

that progress in this line could not have been possible without the use of ice.

STIPULATION AS TO FACTS

It was then stipulated that the law as it is now upon the statute books had been generally acquiesced in by the industry from the date of its passage to the present time, and that the parties complainant were engaged in the manufacture and sale of ice in Oklahoma City under a permit issued by the Corporation Commission under the provisions of the Act in controversy.

There was no further evidence offered by the defendant, whereupon the taking of testimony was closed and the cause submitted.

The above and foregoing is all the evidence introduced at the trial of said cause and all proceedings had in the trial thereof.

Whereupon, complainant-appellant prays that the above statement of evidence be settled, approved and allowed by this court as a full, true, correct and complete statement of all the evidence taken and given on the trial of said [fols. 46-52] Cause, for use on the appeal taken to the United States Circuit Court of Appeals for the Tenth Circuit.

Dated October 30th, 1930.

Everest, Dudley & Brewer, Andrews & Aston; Rainey, Flynn, Green & Anderson, Solicitors for Complainant-Appellant.

IN UNITED STATES DISTRICT COURT

ACCEPTANCE OF SERVICE AND APPROVAL OF STATEMENT OF EVIDENCE

Service of the foregoing statement of evidence, and a receipt of copy thereof, is hereby acknowledged this the 30th day of October, 1930.

Geo. M. Nicholson, Owen & Looney, Solicitors for Defendant.

We have examined the above and foregoing statement, find the same true and correct and hereby agree that such statement may be approved by the court, without notice, and included in the transcript on appeal in said cause.

Dated this the 30th day of October, 1930.

Geo. M. Nicholson, Owen & Looney, Solicitors for Defendant.

The foregoing narrative statement of the evidence is hereby allowed and approved and the same is hereby ordered filed as a statement of the evidence to be included in the record on appeal in the above entitled cause as provided in Sub-division (b) Equity Rule 75.

Dated this 13th day of November, 1930.

John C. Pollock, District Judge.

[File endorsement omitted.]

[fol. 53] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, APRIL TERM, 1931

No. 405

THE SOUTHWESTERN UTILITY ICE COMPANY, a Corporation, Appellant,

vs.

ERNEST A. LIEBMANN, Appellee

No. 406

NEW STATE ICE COMPANY, a Corporation, Appellant

vs.

ERNEST A. LIEBMANN, Appellee

Appeal from the District Court of the United States for the Western District of Oklahoma

Mr. J. B. Dudley and Mr. Guy L. Andrews (Mr. J. H. Everest, Mr. Phil D. Brewer, Andrews & Aston, Rainey,

Flynn, Green & Anderson, and Mr. E. S. Ratliff were with them on the brief) for appellants.

[fol. 54] Mr. Geo. M. Nicholson and Mr. Thos. H. Owen (Mr. M. A. Looney was with them on the brief) for appellee.

Before Cotteral, Phillips and McDermott, Circuit Judges

OPINION—Filed Aug. 20, 1931

PHILLIPS, Circuit Judge, delivered the opinion of the court.

These suits involve the constitutionality of Chap. 147, Okla. S. L. 1925, the provisions of which are set forth in Marginal Note 1.

Note 1

"Section 1. That the manufacture, sale and distribution of ice within the State of Oklahoma is hereby declared to be a public business, as defined by Section 11032, of the Compiled Statutes of Oklahoma.

"Section 2. That no person, persons or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license for such purpose from the Corporation Commission of the State of Oklahoma. The license fee hereunder shall be the sum of fifty cents (50c) per ton per annum, of the daily capacity of ice manufactured, sold or delivered but the minimum license shall be five dollars ($5.00).

"Section 3. That the Corporation Commission shall not issue license to any persons, firm or corporation for the manufacture, sale and distribution of ice, or either of them, within this State, except upon a hearing had by said Commission at which said hearing, competent testimony and proof shall be presented showing the necessity for the manufacture, sale or distribution of ice, or either of them, at the point, community or place desired. If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation, already licensed by said commission at said point, community or place, are sufficient to meet the public needs therein, the said Corporation Com-

mission may refuse and deny the applicant (sic) for said license. In addition to said authority, the said Commission shall have the right to take into consideration the responsibility, reliability, qualifications and capacity of the person, firm or corporation applying for said license and of the person, firm or corporation already licensed in said place or community, as to afford all reasonable facilities, conveniences and services to the public and shall have the power and authority to require such facilities and services to be afforded the public, provided, that nothing herein shall operate to prevent the licensing of any person, firm or corporation now engaged in the manufacture, sale and distribution of ice, or either of them, in any town, city or community of this State whose license shall be granted and issued by said Commission, upon application of such person, firm, or corporation and payment of license fee."

Section 4 provides the procedure for applying for a license and the hearing thereon.

"Section 5. That the Corporation Commission shall have the same power and authority to be charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies and shall have the same power to fix rates, rules, charges and regulations to be observed by such person, firm or corporation engaging in the manufacture, sale and distribution of ice, or either of them, and the affording of all reasonable conveniences, facilities and services, as it may impose as to the transportation and transmission companies.

"Section 6. All and any orders made by said Commission fixing rates, charges, rules and regulations as to any person, firm or corporation engaged in the manufacture, sale and distribution of ice, or either of them, may be reviewed on appeal by the Supreme Court of the State of Oklahoma.

"Section 7. Any person, firm or corporation who shall engage in the business of manufacturing, selling and distributing ice or engage in either of said businesses, without

first obtaining a license, provided for herein, shall be guilty of a misdemeanor and any such person shall be punishable by a fine not to exceed twenty-five dollars ($25.00), and each day's violation shall constitute a separate offense; provided, the Corporation Commission is hereby authorized to promulgate general orders not in conflict with this Act, and to enforce such orders against any person, firm or corporation manufacturing, selling or distributing ice or engaging in either of said businesses, by imposing a fine for the violation thereof not to exceed five hundred dollars for each of said violations."

"Section 8. Any person, persons or corporations aggrieved by any rate, or service, may file an application for a hearing under the terms and conditions of this Act."

Section 9 is a general repealing clause.

[fol. 55] The Southwest Utility Ice Company and the New State Ice Company, hereinafter called plaintiffs, are engaged in the manufacture, sale, and distribution of ice at Oklahoma City under licenses issued by the corporation commission pursuant to Chap. 147, supra. The last license in the record expired June 30, 1930. Renewals of such licenses are neither pleaded nor proven. This alone would justify an affirmance of the decree below, but, in view of the statement of plaintiffs' counsel at the oral argument that such licenses were in fact renewed, we proceed to a consideration of the merits.

If the statute is valid, a license issued thereunder is a property right in the nature of a franchise granted in consideration of the performance of a public service and is within the protection of the Fourteenth Amendment. Frost v. United States, 278 U. S. 515, 519, 520.

In February, 1930, Liebmann, hereinafter called defendant, commenced the construction of an ice manufacturing plant in Oklahoma City and was about to engage in the manufacture, sale, and distribution of ice in that city without first having obtained the license required by Chap. 147, supra. Plaintiffs brought separate suits to enjoin defendant from so doing. The two suits were consolidated for trial.

These cases present the single question: Is the business of manufacturing and selling ice of such a character that [fol. 56] it is subject to regulation to the extent of requiring a certificate of convenience and necessity before a person may engage in such business? Or, to put it another way, may the state prohibit one man from manufacturing ice on his own property and selling it to his neighbor at a price they mutually agree upon? The trial court answered these questions in the negative, and entered a decree dismissing the bills.

Prior to the enactment of Chap. 147, supra, the corporation commission from time to time by order had regulated the price of ice, and its authority so to do had been upheld by the Supreme Court of Oklahoma in Oklahoma L. & P. Co. v. Corporation Commission, 96 Okla. 19, 220 Pac. 54. The corporation commission, under powers granted by prior statutes, had also made and enforced regulations governing the manufacture and sale of ice, to insure honest weights, pure and wholesome ice, and adequate delivery service. By Chap. 147, supra, the legislature undertook to grant the additional power to regulate by limiting the number of persons who might engage in the ice business in a given territory.

While there is no such thing as absolute freedom of the citizen to engage in a lawful business, to make lawful use of his property, or to contract with respect thereto, and such rights are subject to a great variety of restraints, freedom in respect thereto is the general rule and restraint thereof the exception; and the exercise of legislative authority to abridge such rights can be justified only by the existence of exceptional circumstances. Adkins v. Children's Hospital, 261 U. S. 525, 546; Ribnik v. McBride, 277 U. S. 350, 356.

In Williams v. Standard Oil Co., 278 U. S. 235, the court said:

"It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.' * * * That phrase, however it may be characterized, has become the estab-

lished test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or prop- [fol. 57] erty, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby in effect *granted* to the public. * * * Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

In Tyson & Bro. v. Banton, 273 U. S. 418, the court said:

"The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238, 246, but exists only where the business or the property involved has become 'affected with a public interest.' * * *

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood.

"The characterization in some decisions of businesses as 'quasi public,' People v. King, 110 N. Y. 418, 428 'not "strictly" private,' Aaron v. Ward, 203 N. Y. 351, 356, and the like, while well enough for the purpose for which they were employed, namely, as a basis for upholding police regulations in respect of the conduct of particular businesses, cannot be accepted as equivalent for the description 'affected with a public interest,' as that phrase is used in the decisions of this court as the basis for legislative regulation of prices. The latter power is not only a more definite

and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legis- [fol. 58] lative regulation of the manner in which a business shall be carried on. * * *

"The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, * * * that it shall be devoted to 'a public use.' Stated in another form, a business or property in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public."

However, the fact that a business is "affected with a public interest" does not subject it to unlimited regulation. In Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, the court said:

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

In Tyson & Bro. v. Banton, supra, the court further said:

"The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, Case of the State Freight Tax, 15 Wall.

232, 278, and, as such, within the protection of the process [fol. 59] of law clauses of the Fifth and Fourteenth Amendments. See City of Carrollton v. Bazzette, 159 Ill. 284, 294. The power to regulate property, services or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all."

A state may not, under the guise of protecting the public, arbitrarily prohibit a person from engaging in a lawful, private business, or impose unreasonable and unnecessary restrictions upon such a business. Burns Baking Co. v. Bryan, 264 U. S. 504, 513; Liggett Co. v. Baldridge, 278 U. S. 105, 113; Lawton v. Steele, 152 U. S. 133, 137; Meyer v. Nebraska, 262 U. S. 390, 399, 400.

A declaration by the legislature that a business is affected with a public interest is not conclusive. The matter is always open to judicial inquiry. Wolff Co. v. Industrial Court, supra, p. 536; Tyson & Bro. v. Banton, supra, p. 431.

The inquiry then is whether the manufacture and sale of ice is a business affected with a public interest to the extent required to justify the regulations sought to be imposed. This requires an examination into the nature of the business, the features thereof which touch the public, and the abuses reasonably to be feared. Wolff Co. v. Industrial Court, supra, p. 539.

In Wolff Co. v. Industrial Court, supra, the court divides businesses, said to be "clothed with a public interest," into three classifications, as follows:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. State v. Edwards, 86 Me. 102; Terminal Taxi-[fol. 60] cab Co. v. District of Columbia, 241 U. S. 252, 254.

(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be enitled to protection accordingly."

The right to manufacture and sell ice is not a privilege in the nature of a franchise, such as the right to maintain a public wharf, or to operate a railroad or a street railway (26 C. J. p. 1011, Sec. 4; 51 C. J. p. 411, Sec. 8), but is a matter of common right open to all. Cap. F. Bourland Ice Co. v. Franklin Utilities Co., 180 Ark. 770, 22 S. W. (2d) 993. Furthermore, it does not require a franchise to use the public streets.

It is clear that the ice business in its inception did not fall within either the first or second classification set forth in Wolff Co. v. Industrial Court, supra; Ice Co. v. Franklin Utilities Co. supra; State v. Orear, — Mo. —, 210 S. W. 392, 396, 397.. Therefore, we must determine whether there has come to exist in the manufacture and sale of ice peculiar conditions which have a definite relation to the public interest sufficient "to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use" and bring it within the third classification. Tyson & Bro. v. Banton, supra, pp. 433, 438; Ribnik v. McBride, supra, pp. 355, 356.

In Wolff Co. v. Industrial Court, supra, the court further said:

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

[fol. 61] When rates or charges in a business are fixed by public regulation, competition is largely removed. Such rates must be sufficient to produce a fair return upon the

value of the manufacturer's plant used and useful in the business. Permitting additional plants to enter the field in excess of the market requirements, unnecessarily increases rates to be fixed by the regulatory body and paid by the consumer. It is to prevent such needless duplication of plants and facilities, and the consequent increase in rates or charges, that certificates of public convenience and necessity are required. Idaho Light & Power Co. v. Blomquist, 26 Ida. 222, 141 Pac. 1083, 1089, 1090.

The regulation of the price at which ice may be sold is an extraordinary interference with the liberty of the citizen (Near v. State of Minnesota, 283 U. S. —; Tyson & Bro. v. Banton, supra, p. 431; Ribnik v. McBride, supra, p. 356; Adkins v. Children's Hospital, supra, pp. 546, 560, 561), and can only be justified by the existence of exceptional circumstances making it necessary for the protection of the public.

Notwithstanding the close relation between price regulation and the requirement of a certificate of convenience and necessity, we are of the opinion that a limitation on the right to engage in a business which is a matter of common right is an even greater encroachment on the rights of the citizen than the regulation of prices in such business. Hence, to justify such a limitation, there must exist stronger circumstances, making the regulation necessary in order to protect the public, than are required to warrant the fixing of rates or prices.

In 1929 Arkansas adopted a statute by which it undertook to empower the railroad commission to fix the price and regulate the delivery or distribution of manufactured ice, and to limit the number of persons who might engage in the manufacture, sale, or distribution of ice in a given territory. See Act 55, General Assembly of Arkansas, 1929. The validity of this statute came before the supreme court of that state in Ice Co. v. Franklin Utilities Co. supra. The court sustained the provisions of the law empowering the railroad commission to fix the price of ice, but held the provisions authorizing that commission to limit the number of persons who might engage in the manufacture and distribution of ice in a given territory to be an undue in- [fol. 62] terference with the common or natural right of the citizens to engage in such business, not necessary for the protection of the public interests, and in violation of

the provisions of the Arkansas constitution prohibiting the creation of a monopoly and of the Fourteenth Amendment to the Federal Constitution.

Ice is now generally used for the conservation and preservation of food stuffs and in the treatment of the sick, and is recognized as a necessary and indispensable commodity. However it is no more essential than are meat, bread, clothing, or coal, and "it has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood-chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation," and "one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sell to the public in the common callings of which those above mentioned are instances." Wolff Co. v. Industrial Court, supra, p. 537. Therefore, it becomes pertinent to inquire whether there is sufficient actual or potential competition in the sale and distribution of ice to protect the public from arbitrary treatment and exorbitant prices. Home ice manufacturing plants are now available to persons of average means. Many hospitals, restaurants, meat markets, hotels and dairies have their own ice manufacturing and refrigerating plants. Ice may be shipped by rail in refrigerator cars a distance of 100 miles at an approximate cost of ten cents per hundred. It may be transported in insulated trucks over improved highways a distance of 75 miles and sold in competition with local ice manufacturers. Ice manufacturers in Oklahoma in 1925 operated 378 rural routes extending 25 to 30 miles from their plants through sparsely settled territory, and delivered ice to consumers on farms and in small communities. In 1930 such routes had been increased to 769. Therefore, while one ice plant can supply the ice needs of an ordinary city, and most of the smaller cities have only one ice plant, if an ice manufacturer in a town having only one plant should demand excessive prices, manufacturers in nearby towns, in the absence of monopolistic trade agreements, would normally compete by shipping in ice by rail or trucks.

[fol. 63] Counsel for plaintiffs assert that a carload of ice will weigh approximately eighteen tons; that a small com-

munity will consume only about one and a half tons per day, and that it is therefore impractical to ship ice to such a community in carload lots because of the loss from shrinkage and the carrying expense. Of course this is true, but such a community could not support a small commercial ice plant and would have to be served through truck transportation from ice plants in larger cities.

Counsel for plaintiffs further assert that since the adoption of Chap. 147, supra, the quality of ice has improved, honest weights have been given, regular deliveries have been maintained, and the amount of ice used has greatly increased. While only two states, Oklahoma and Arkansas, have enacted statutes to fix prices and limit the number of persons who may engage in the ice business, we know as a matter of common knowledge that such improvements have taken place in other states. Therefore, they are not attributable to, and may be accomplished without such regulations. To a large extent, they may be ascribed to the efforts of the National Association of Ice Industries. Eighty-four per cent. of the ice produced in the United States is manufactured by members of that association. People have learned the value of ice for the conservation and preservation of food and health. They are buying and using it in increasing quantities. Ice plants in the United States increased from 2700 in 1914 to 6200 in 1929. The annual per capita consumption of ice in the United States increased from 712 pounds in 1919 to 1157 pounds in 1929. Business and home refrigeration plants have produced competition. Scoring machines by which ice is cut into uniform over-sized blocks to compensate for loss from shrinkage came into use about 1925. Resulting improvements in the quality of ice and in service have naturally followed.

Neither has the Oklahoma law resulted in lowering of the price to the consumer. On the contrary, the price of ice in that state, if allowance is made for the decrease in the cost of manufacture, has increased. Furthermore, the cost of ice in Oklahoma compares unfavorably with the cost of ice in other southern states. The prices of ice during the year 1928, three years after the adoption of the Oklahoma statute, in eleven southern states, as shown by [fol. 64] the last edition of the Ice Blue Book (a standard authority) published in 1928, are as follows:

	Domestic Trade (100 lbs.)	Light commercial (160 lbs.)	Heavy commercial ton	Dealers, ton	Carload, ton	Car Icing, ton
Alabama	58.5c	43.4c	$7.55	$7.00	$4.75	$6.18
Arkansas	59.2c	46.7c	7.92	6.89	4.83	6.00
Florida	61.0c	40.5c	6.67	6.73	4.22	5.96
Georgia	62.5c	48.0c	7.72	5.75	4.25	5.75
Louisiana	53.0c	42.0c	7.03	5.50	4.50	5.87
Mississippi	63.3c	48.8c	8.14	6.88	5.00	6.82
N. Carolina	60.5c	42.0c	7.25	4.56	3.83	5.46
Oklahoma	70.0c	50.0c	8.60	6.96	5.90	7.70
S. Carolina	62.0c	48.5c	8.20	6.50	5.00	7.50
Tennessee	54.0c	44.5c	7.40	5.33	3.80	6.15
Texas	64.0c	42.0c	8.10	6.00	4.58	6.57
Average	60.7c	45.1c	7.50	6.19	4.60	6.36

It is our conclusion that, while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices. With such competition existing in the business, we seriously doubt that the manufacture of ice is so affected with a public interest as to justify the fixing of prices at which the commodity shall be sold, and we hold that it is not so affected to the extent required to warrant the more serious invasion of the rights of the citizens by limiting the number of persons who may engage in such business in a given territory.

The decree is affirmed with costs.

[fol. 65] IN UNITED STATES CIRCUIT COURT OF APPEALS

DECREE—Aug. 27, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court, in this cause, be and the same is hereby affirmed, and that Ernest A. Liebmann, appellee, have and recover of and from New State Ice Company, a corporation, appellant, his costs herein.

[fol. 66] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Sept. 16, 1931

To the Honorable John H. Cotteral, Circuit Judge, or to any Judge of the United States Circuit Court of Appeals, Tenth Circuit:

I

Your petitioner, New State Ice Company, a corporation, the appellant in the above entitled cause, complains of the judgment and decree of the United States Circuit Court of Appeals, Tenth Circuit, made and entered herein on the 27th day of August, 1931, affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma, and shows that there was drawn in question in said cause in said Circuit Court of appeals, the validity of the Act of the Legislature of the State of Oklahoma approved April 7, 1925, being Chapter [fol. 67] 147, Session Laws of Oklahoma, 1925, on the ground that said act was repugnant to the Constitution of the United States and that the business of manufacturing, selling and distributing ice to the public in said State was not a business clothed with such public interest as to justify its regulation by the State of Oklahoma or its duly constituted authority.

II

Your petitioner, the appellant in said cause, further shows that it relied upon the validity of said act in bringing the action in the District Court of the United States for the Western District of Oklahoma, and in the prosecution of its appeal from the judgment and decree of that Court to said Circuit Court of Appeals; that said Circuit Court of Appeals, in said judgment and decree, held against the validity of said act.

III

Your petitioner, the appellant herein, feeling itself aggrieved by said judgment and decree, desires to appeal

therefrom to the Supreme Court of the United States and hereby respectfully prays for the allowance of an appeal to said Court, and that supersedeas or cost bond be fixed staying said judgment and decree pending said appeal.

IV

Your petitioner, the appellant herein, herewith presents its assignment of errors upon which it will rely on [fol. 68] appeal.

V

Your petitioner, the appellant herein, further shows that it has from time to time in compliance with the provisions of said Act of the Legislature of the State of Oklahoma, renewed its license, and that it now has, and, at all times since the commencement of said action in the District Court of the United States for the Western District of Oklahoma, has been the holder of a license duly issued by the Corporation Commission of the State of Oklahoma in accordance with the provisions of said act entitling it to manufacture, sell and distribute ice under the provisions thereof.

Wherefore your petitioner prays for the allowance of an appeal from said judgment and decree of said Circuit Court of Appeals to the Supreme Court of the United States and for a supersedeas of said judgment and decree, with directions as to the amount of the bond to be filed to act as said supersedeas.

Dated this the 16th day of September, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Attorneys for Petitioner. Rainey, Flynn, Green & Anderson, of Counsel.

[fol. 69] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Sept. 16, 1931

Comes now the New State Ice Company, the appellant in the above entitled cause, and files the following assign-

ment of errors upon which it will rely in the prosecution of the appeal from the judgment and decree of the United States Circuit Court of Appeals, Tenth Circuit, made and entered herein on August 27, 1931, to the Supreme Court of the United States:

(1) That said Circuit Court of Appeals erred in holding that the act of the Legislature of the State of Oklahoma, approved April 7, 1925, being Chapter 147 Session Laws of Oklahoma, 1925, was invalid, on the ground of its being repugnant to the Constitution of the United States.

(2) That said Circuit Court of Appeals erred in affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma dis- [fol. 70] missing the bill of the plaintiff therein, the appellant herein, on the ground that said Act was invalid as being repugnant to the Constitution of the United States.

Wherefore Appellant prays said judgment and decree be reversed, and for such other and further relief as it may be entitled.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Attorneys for Appellant. Rainey, Flynn, Green & Anderson, of Counsel.

[fol. 71] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

No. 406

NEW STATE ICE COMPANY, a Corporation, Appellant,

vs.

ERNEST A. LIEBMANN, Appellee

ORDER ALLOWING APPEAL AND FIXING SUPERSEDEAS OR COST BOND—Filed Sept. 16, 1931

The petition of New State Ice Company, the appellant in the above entitled cause, for an appeal from the judgment and decree of the United States Circuit Court of Appeals, Tenth Circuit, made and entered herein on August

27, 1931, to the Supreme Court of the United States, is hereby granted and the appeal is allowed, and upon said petitioner filing a bond in the sum of $500.00, with sufficient sureties, conditioned as required by law, the same shall operate as a supersedeas of said judgment and decree, and shall suspend and stay all further proceedings in this Court until the determination of said appeal by the Supreme Court of the United States.

Dated this the 16th day of September, 1931.

John H. Cotteral, Judge United States Circuit Court of Appeals, Tenth Circuit.

[File endorsement omitted.]

[fols. 72-79] Supersedeas or cost bond on appeal for $500.00, approved and filed September 26, 1931, omitted in printing.

[fol. 80] Citation, in usual form, showing service on Thomas H. Owen et al., filed October 5, 1931, omitted in printing.

[fol. 81] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD—Filed Oct. 5, 1931

It is hereby stipulated and agreed between the parties hereto that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

(1) The petition of the appellant for appeal to the Supreme Court of the United States and the assignment of errors filed therewith.

(2) Order allowing appeal and fixing supersedeas or cost bond.

(3) Supersedeas or cost bond, showing approval thereof.
(4) Citation, with acceptance of service thereof.
(5) Notice of appeal, and acceptance of service thereof.
[fol. 82] (6) The opinion of the Circuit Court of Appeals filed August 20, 1931, together with the decree entered August 27, 1931.
(7) Printed transcript of record of the Circuit Court of Appeals filed December 5, 1930.
(8) This stipulation.
(9) Certificate and Seal.

This stipulation is made under paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, and is in lieu of præcipe and counter-præcipe provided for therein.

Dated this 2nd day of October, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Counsel for Appellant. George M. Nicholson, Thos. H. Owen, N. A. Looney, Counsel for Appellee.

[fol. 83] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

[Title omitted]

NOTICE OF APPEAL AND ACCEPTANCE OF SERVICE THEREOF—Filed Oct. 5, 1931

To the above-named appellee and his counsel of record:

You are hereby notified that the above named appellant appeals from the decree made and entered herein on August 27, 1931, against it, in favor of the above named appellee, to the Supreme Court of the United States.

Dated this 16th day of September, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Counsel for Appellant.

[File endorsement omitted.]

[fol. 84] Acceptance of Service

The above named appellee hereby accepts service of the above and foregoing notice this 16th day of September, 1931.

George M. Nicholson, Thos. H. Owen, N. A. Looney, Counsel for Appellee.

[fol. 85] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 86] In Supreme Court of the United States

Statement of Points to be Relied Upon by Appellant and Stipulation as to Printing Record—Filed Oct. 15, 1931

Comes now the appellant in the above entitled cause and states that the points upon which it intends to and will rely in this Court, are as follows:

Point I

That the Act of the Legislature of the State of Oklahoma, approved April 7, 1925, (being Chapter 147, Session Laws of Oklahoma, 1925), is valid, and the United States Circuit Court of Appeals, Tenth Circuit, erred in holding said Act invalid on the ground that it was repugnant to the Constitution of the United States.

Point II

That said Circuit Court of Appeals erred in affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma, dismissing the bill of the plaintiff therein, the appellant herein, on the ground that said Act was invalid as being repugnant to the Constitution of the United States.

[fol. 87] Point III

That said legislative act declares the manufacture, sale and distribution of ice to be a public business, and, under

the facts and circumstances as disclosed by the evidence, the manufacture, sale and distribution of ice is a public business, subject to regulation and control by the Corporation Commission of the State of Oklahoma under the terms and provisions of said Act, and said Circuit Court of Appeals erred in holding said Act invalid on the ground of its being repugnant to the Constitution of the United States, and in affirming the judgment and decree of the District Court.

The foregoing statement of points is made under paragraph 9 of Rule 13 of this Court, but does not include the parts of the record as therein provided, due to the fact that a stipulation has been signed with reference thereto.

Dated this 12th day of October, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Counsel for Appellant. Rainey, Flynn, Green & Anderson, of Counsel.

[fols. 88 & 89] Acceptance of Service

Appellee accepts service of the above and foregoing statement of points to be relied upon by appellant, as provided for in paragraph 9 of Rule 13.

The stipulation referred to therein as to the parts of the record has been made.

Dated this 12th day of October, 1931.

George M. Nicholson, Thos. H. Owen, N. A. Looney, Attorneys for Appellee.

[fol. 90] Stipulation as to Printing of Record

It is hereby stipulated and agreed by and between the parties hereto that the following parts of the transcript shall be printed under the supervision of this Court and that the remaining parts thereof shall be omitted:

(1) The petition of appellant for appeal to the Supreme Court of the United States, and the assignment of errors filed therewith. (Transcript, Pages 66 to 70, inclusive.)

(2) Order allowing appeal and fixing supersedeas or cost bond. (Transcript, Page 71.)

(3) Supersedeas or cost bond, showing approval thereof. (Transcript, Pages 72 and 73.)

Omit certified copy of general power of attorney and certain resolutions appearing in the transcript at Pages 74 to 79, inclusive.

(4) Citation, with acceptance of service thereof. (Transcript, Page 80.)

(5) Notice of appeal, and acceptance of service. (Transcript, Pages 83 and 84.)

(6) Stipulation as to contents of transcript of record. (Transcript, Pages 81 and 82.)

(7) The opinion of the United States Circuit Court of Appeals, Tenth Circuit, filed August 20, 1931, (Transcript, Pages 54 to 64, inclusive), together with the decree of said Court entered August 27, 1931. (Transcript, Page 65.)

(8) Complaint. (Transcript, Pages 2 to 5, inclusive.)

(9) Answer. (Transcript, Pages 6 to 10, inclusive.)

[fols. 91 & 92] (10) Statement of evidence. (Transcript, Pages 22 to 46, inclusive.)

(11) Decree. (Transcript, Page 21.)

(12) Certificate of the Clerk of the United States Circuit Court of Appeals, Tenth Circuit. (Transcript, Page 85.)

(13) Statement of points to be relied upon by appellant.

(14) This stipulation.

Dated this the 12th day of October, 1931.

J. B. Dudley, Guy L. Andrews, J. H. Everest, Counsel for Appellant. Rainey, Flynn, Green & Anderson, of Counsel. George M. Nicholson, Thos. H. Owen, N. A. Looney, Counsel for Appellee.

[fol. 93] [File endorsement omitted.]

Endorsed on cover: File No. 36,277. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 463. New State Ice Company, appellant, vs. Ernest A. Liebmann. Filed October 15, 1931. File No. 36,277.

NO. [illegible]

In the Supreme Court of the United States

(OCTOBER TERM, 1931.)

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

STATEMENT OF GROUNDS ON WHICH APPELLANT CONTENDS THIS COURT HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE APPEALED FROM AS REQUIRED BY PARAGRAPH 1 OF RULE 12.

[illegible]

NO. 463

In the Supreme Court of the United States

(OCTOBER TERM, 1931.)

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THIS COURT HAS JURISDICTION TO REVIEW, ON APEAL, THE JUDGMENT OR DECREE APEALED FROM AS REQUIRED BY PARAGRAPH 1 OF RULE 12.

The appellant herein, pursuant to Paragraph 1 of Rule 12 of this Court, files this, its statement showing the basis on which it contends that this Court has appellate jurisdiction to review on appeal the judgment or decree appealed from herein.

(1) The statute believed to sustain appellate jurisdiction is 28 U. S. C. A., Section 347 (b), (Judicial Code, Section 240, as amended by Act of February 13, 1925, 43 Stat. at L. 939, Chapter 229), which provides:

"Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

(2) The judgment or decree of the United States Circuit Court of Appeals, Tenth Circuit, appealed from, was entered August 27, 1931. (Unprinted Record 65). The opinion was filed on August 20, 1931, and appears in the Unprinted Record at pages 53 to 64, inclusive. The application for an appeal was presented and allowed on September 16, 1931. (Unprinted Record 71).

(3) The appeal herein is from a final judgment or decree of the United States Circuit Court of Appeals, Tenth Circuit, holding invalid, as being repugnant to the Constitution of the United States, the Act of the Legislature of the State of Oklahoma approved April 7, 1925 (Chapter 147, Session Laws of Oklahoma 1925), declaring the manufacture, sale and distribution of ice to be a public business and placing the same under the jurisdiction of the Corporation Commission, giving that Commission the power, upon a hearing, to issue a permit or license, providing for a license fee, and a penalty for the manufacture, sale and distribu-

tion of ice without securing a permit or license as provided for therein. The applicable provisions of this Act are set out in Marginal Note 1 of the opinion of the Circuit Court of Appeals. (Unprinted Record 54-55.)

The appellant complied with the provisions of said Act and obtained from said Commission a license or permit to manufacture, sell and distribute ice in Oklahoma City, Oklahoma, and was engaged in such business under said license or permit on March 31, 1930, the date of the commencement of this action in the District Court of the United States for the Western District of Oklahoma, and is now, and ever since has been, so engaged. On and prior to March 31, 1930, the appellee was preparing to engage in the manufacture, sale and distribution of ice in Oklahoma City without complying with said Act and in violation thereof. On March 31, 1930, the appellant herein commenced an action in the District Court of the United States for the Western District of Oklahoma against the appellee, seeking to enjoin him from engaging in the manufacture, sale and distribution of ice in said city without complying with said Act. The complaint of the appellant appears in the Unprinted Record here, pages 4 and 5. The appellant in its complaint alleged that said permit or license issued to it by said Commission for the manufacture and sale of ice under the provisions of said Act constitutes and is a franchise property right, that it had invested in the business of the manufac-

ture and sale of ice in said city under said license or permit a large amount of money; that the appellee had no right to engage in such business within said city without first having obtained a license or permit from said Commission so to do; that the manufacture, sale and distribution of ice by him in said city, without having obtained a license or permit from said Commission, will injuriously affect the business, revenues and properties of the appellant invested therein and deprive it of its property without due process of law.

The appellee, in his answer, admits that the appellant was engaged in the manufacture of ice in Oklahoma City under a license or permit issued to it by said Commission, but denies that such license or permit constitutes a franchise property right. He also admits that he is preparing to and will engage in the manufacture, sale and distribution of ice in Oklahoma City without complying with the terms and provisions of said Act, and avers that said Act is repugnant to the Constitution of the United States, and particularly Section 10, Artiele I, thereof, and the Fourteenth Amendment thereto. The answer of the appellee appears in the Unprinted Record here, pages 6 to 10, inclusive.

In paragraph 3 of said answer, the defendant states:

"Said defendant admits that said complainant is engaged in the manufacture of ice in Oklahoma City, Oklahoma, under a license or permit issued to it by

> the Corporation Commission of the State, but specifically denies that such license or permit constitutes a franchise property right." (Unprinted Record 6.)

and in paragraph 9 of his answer he states:

> "Defendant further states and avers that the complainant is not engaged in the sale and distribution of ice to the public in Oklahoma City, State of Oklahoma; that all ice sold and distributed to the consumers in said city is sold and distributed by the Oklahoma City Ice Company, a corporation, and that said complainant should not be permitted to maintain this suit." (Unprinted Record 9-10.)

In other words, the appellee admitted that the complainant was engaged in the manufacture of ice, but denied that it was engaged in the sale and distribution thereof. During the trial of this case in the trial court, the following stipulation was made:

> "It was then stipulated that the law as it is now upon the statute books had been generally acquiesced in by the industry from the date of its passage to the present time. and that the parties complainant were engaged in the manufacture and sale of ice in Oklahoma City under a permit issued by the Corporation Commission under the provisions of the Act in controversy."

From this stipulation and the admissions of the appellee in his answer, we assert that the appellant was engaged in the manufacture and sale of ice in Oklahoma City under a permit issued to it by the Corporation Commission under the terms and provisions of said Act.

The trial court held said Act unconstitutional and void.

The decree of the trial court appears in the Unprinted Record at page 21, from which we quote:

> "On June 24th, 1930, the court, on further and final consideration of the pleadings, the evidence introduced and stipulations made by the parties, finds the issues in favor of the defendant and against the complainant; that the Act of the Legislature of the State of Oklahoma, of April 7, 1925, being Chapter 147, Session Laws of Oklahoma 1925, is unconstitutional and void, and that the complaint of the complainant is without equity and should be dismissed with prejudice."

The memorandum opinion of the trial court appears in the Unprinted Record at pages 11 to 21.

(4) The appellant duly perfected an appeal from the judgment and decree of the District Court of the United States for the Western District of Oklahoma to the United States Circuit Court of Appeals, Tenth Circuit, and an opinion was filed in that Court on August 20, 1931, affirming the decree of the District Court. (Unprinted Record 53-54.) On August 27, 1931, a formal decree was entered in the Circuit Court of Appeals affirming the decree of the District Court. (Unprinted Record 65.)

The Southwest Utility Ice Company brought a similar suit in the District Court against the appellee here. The two cases were tried together, though not consolidated. (Unprinted Record 11.) Separate appeals were taken to the Circuit Court of Appeals and the appellant here was the appellant in Cause No. 406 of that Court and the South-

west Utility Ice Company was appellant in Cause No. 405. The two cases were argued and submitted together in the Circuit Court of Appeals and disposed of by that Court in a joint opinion, copy of which was filed in each case, and a formal decree of affirmance was entered in each case, and the appellant here, the appellant in Cause No. 406 in the Circuit Court of Appeals, has brought its case here, by appeal, for review.

The Circuit Court of Appeals, in the beginning of its opinion, said:

> "These suits involve the constitutionality of Chap. 147, Okla. S. L. 1925, the provisions of which are set forth in Marginal Note 1." (Unprinted Record 54.)

and later stated the question involved in these words:

> "These cases present the single question: Is the business of manufacturing and selling ice of such a character that it is subject to regulation to the extent of requiring a certificate of convenience and necessity before a person may engage in such business? Or, to put it another way, may the state prohibit one man from manufacturing ice on his own property and selling it to his neighbor at a price they mutually agree upon? The trial court answered these questions in the negative, and entered a decree dismissing the bills." (Unprinted Record 55-56.)

In concluding the opinion, the Circuit Court of Appeals used these words:

> "It is our conclusion that, while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices. With such competition existing in the

business, we seriously doubt that the manufacture of ice is so affected with a public interest as to justify the fixing of prices at which the commodity shall be sold, and we hold that it is not so affected to the extent required to warrant the more serious invasion of the rights of the citizens by limiting the number of persons who may engage in such business in a given territory.

"The decree is affirmed with costs."

(5) The complainant in the trial court, the appellant here, relied upon the validity of said Act of the Legislature of the State of Oklahoma and sought injunctive relief against the defendant there, the appellee here, under said Act, and there was squarely drawn in question, in that Court, the validity of said Act on the ground of its being repugnant to the Constitution of the United States and that Court held said Act invalid as being repugnant to the Constitution of the United States. The validity of said Act was drawn in question in the Circuit Court of Appeals, and that Court held the Act invalid as being repugnant to the Constitution of the United States, and the appellant here has the right, at its election, to have the judgment and decree of that Court reviewed, by appeal, here, under the express provisions of 28 U. S. C. A., Section 347 (b), *supra*.

New York ex rel Bryant v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184.

Home Ins. Co. v. *Dick*, 281 U. S. 397, 74 L. ed. 926.

Hughes Federal Practice, Vol. 5, Secs. 3153 and 3154.

Cyclopedia of Federal Procedure, Vol. 5, Chap. 50, Sec. 2636.

Respectfully submitted,

J. B. DUDLEY,
GUY L. ANDREWS,
J. H. EVEREST,
Counsel for Appellant.

RAINEY, FLYNN, GREEN & ANDERSON,
Of Counsel.

FILE COPY

NO. 463

In the Supreme Court of the United States

OCTOBER TERM, 1931

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

BRIEF OF APPELLANT

JOHN B. DUDLEY,
J. H. EVERETT,
GUY L. ANDREWS,
Counsel for Appellant.

RAINEY, FLYNN, GREEN & ANDERSON,
Of Counsel.

Universal Typewriting Co., Chicago, Ill.

SUBJECT INDEX

	PAGE
Official Report of the Opinions Delivered in the Courts Below	1
Jurisdiction	1
Statement of the Case	2
(a) Act of April 7, 1925 (Ice Act)	3
(b) Section 11032, Compiled Oklahoma Statutes 1921	6
(c) Substance of Complaint	9
(d) Substance of Answer	10
(e) Ice Permit, 1929-1930	14
(f) Summary of Appellee's Evidence	15
(g) Summary of Appellant's Evidence	18
Specification of Errors	32
Summary of the Argument	33
Argument	34
First Proposition	34
Conclusion	55

STATUTES CITED

28 U. S. C. A., Sec. 347 (b), (Judicial Code, Sec. 240, as amended by Act of February 13, 1925)	2
Chapter 147, Session Laws of Oklahoma 1925	2
Chapter 90, Compiled Oklahoma Statutes 1921	7
Session Laws of Oklahoma 1907-08, page 750	7
Section 11017 of Chapter 90	8
Section 11032 of Chapter 90	8
Compiled Statutes of Oklahoma 1909, Chapter 113	8
Sections 8800 and 8812, Chapter 113	8
Revised Laws of Oklahoma 1910, Chapter 79	8
Sections 8220 and 8235, Chapter 79, Revised Laws 1910	41
Section 15, Article 9 of the Constitution of Oklahoma	35
Section 18, Article 9 of the Constitution of Oklahoma	35, 49
Section 19, Article 9 of the Constitution of Oklahoma	35

PAGE

Section 13 of the original Trust Act of June 10, 1908 (Session Laws of Oklahoma 1907-08, page 750) 36
Sections 1 and 13 of original Trust Act of June 10, 1908 41
Chapter 176, Session Laws of Oklahoma 1915 ..... 42, 52
Sections 3712-3715, Compiled Oklahoma Statutes 1921 ..... 42, 52
Section 20, Article 9 of the Constitution of Oklahoma 49
Chapter 52, Session Laws of Oklahoma 1919, page 86 52
Sections 11046-11050, Article 2, Chapter 90, Comp. Stat. Okla. 1921 52
Section 5 of the Cotton Act 52
Chapter 113, Session Laws of Oklahoma 1923, page 188 54

TABLE OF CASES CITED

Baker v. Capshaw, 130 Okla. 86, 265 Pac. 115 52
Brass v. State of North Dakota (Stoeser), 153 U. S. 391, 38 L. ed. 757 45
Budd v. State of New York, 143 U. S. 517, 336 L. ed. 247 45

Cap F. Bourland Ice Co. v. Franklin Utilities Co., 180 Ark. 770, 22 S. W. (2d) 993, 68 A. L. R. 1018 47
Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328 35
Chickasha Cotton Oil Co. v. Cotton County Gin Co., 40 Fed. (2d) 846 42
City of Denton v. Denton Home Ice Co. (Texas.), 18 S. W. (2d) 606 47
City of Denton v. Denton Home Ice Co. (Tex.), (on rehearing), 27 S. W. (2d) 119 47
City of Tombstone v. Macia (Ariz.), 245 Pac. 677 47
Corporation Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945 35
Consumers Light & Power Co. v. Phipps, 129 Okla. 223, 251 Pac. 63 41

Ex parte Tindall, 102 Okla. 192, 229 Pac. 125 54

Fairmont Creamery Co. v. State of Minnesota, 274 U. S. 1, 74 L. ed. 893 46
Frost v. Corporation Commission of the State of Oklahoma, 278 U. S. 515, 73 L. ed. 483 ..... 34, 42
Frost v. Corporation Commission, 26 Fed. (2d) 508 ..... 51, 52

Garner v. Tulsa Ice Co., P. U. R. 1917C 613 43
German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011 ..... 35, 45

Harris-Irby Cotton Co. v. State, 31 Okla. 603, 122 Pac. 163 ..... 41, 49
Holton et al. v. City of Camailla (Ga.), 68 S. E. 472 47

In re. Farmers Co-operative Gin Co., 122 Okla. 115, 251 Pac. 729 53

Laughlin v. City of Portland (Me.), 90 Atl. 318 47
Liberty Warehouse Co. v. Burley Tobacco Growers Co-operative Marketing Assn., 276 U. S. 71, 72 L. ed. 473 45

McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315 35
Munn v. Illinois, 50 U. S. 113, 24 L. ed. 77 ..... 35, 45

PAGE

Muskogee Gas & Electric Co. v. State, 81 Okla. 176, 186 Pac. 730 52

New State Ice Co. v. Liebmann, and Southwest Utility Ice Co. v. Liebmann, Nos. 1107, 1108, 42 Fed. (2d) 913 (R. 9-19) 1
New State Ice Co. v. Liebmann, and Southwest Utility Ice Co. v. Liebmann, Nos. 405, 406, 52 Fed. (2d) 349 (R. 46-57) 1
Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112 45

O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 75 L. ed. 324 45
Oklahoma City Co. v. State of Oklahoma, 252 U. S. 339, 64 L. ed. 600 42
Oklahoma Gin Co. v. State, 63 Okla. 10, 148 Pac. 629 37
Oklahoma Operating Co. v. Love, 252 U. S. 331, 64 L. ed. 596 42
Oklahoma Light & Power Co. v. Corporation Commission, 96 Okla. 19, 220 Pac. 54 37

Peoples Transit Co. v. Henshaw (8th Cir.), 20 Fed. (2d) 87 34
Pioneer Telephone & Telegraph Co. v. State, 40 Okla. 417, 138 Pac. 1033 50-52
Planters Cotton & Ginning Co. v. West Bros., 82 Okla. 145, 198 Pac. 855 42

Ribnik v. McBride, 277 U. S. 320, 72 L. ed. 916 46

Shawnee Gas & Electric Co. v. Corporation Commission, 35 Okla. 455, 130 Pac. 127 37
Shawnee Gas & Electric Co. v. State ex rel Shawnee Waterworks, 31 Okla. 505, 122 Pac. 222 37
Sims v. State, 80 Okla. 254, 196 Pac. 132 42
South Utah Mines & Smelters v. Beaver County, 262 U. S. 325, 67 L. ed. 1004 35
Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173 45

Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984 45
Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266, 70 L. ed. 578 45
Toombs v. Citizens Bank, 281 U. S. 642, 74 L. ed. 1088 35
Tyson & Bro. v. Banton, 273 U. S. 418, 71 L. ed. 718 46

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 103 45
Wadley Southern Railway Co. v. State of Georgia, 235 U. S. 651, 59 L. ed. 405 55
Williams v. Standard Oil Co., 278 U. S. 235, 73 L. ed. 287 46

APPENDIX

Original Act of June 10, 1908 i
Chapter 90, Compiled Oklahoma Statutes, 1921 viii
Ice Permit of Appellant for 1930-1931 xvii
Ice Permit of Appellant for 1931-1932 xviii

NO. 463

In the Supreme Court of the United States

OCTOBER TERM, 1931

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

BRIEF OF APPELLANT

The Official Report of the Opinions Delivered in the Courts Below.

DISTRICT COURT:

New State Ice Company vs. Liebmann, and Southwest Utility Ice Company vs. Liebmann, Nos. 1107, 1108, 42 Fed. (2d) 913 (R. 9-19).

CIRCUIT COURT:

New State Ice Company vs. Liebmann, and Southwest Utility Ice Company vs. Liebmann, Nos. 405, 406, 52 Fed. (2d) 349 (R. 46-57).

Jurisdiction

The appellant, pursuant to paragraph 1 of rule 12 of this Court, filed its statement showing the basis on which it

contends that this Court has appellate jurisdiction to review, on appeal, the judgment and decree of the Circuit Court of Appeals. There was drawn in question in that court the validity of a statute of the State of Oklahoma, on the ground of its being repugnant to the Constitution of the United States, and the decision of that court was against its validity. The appellant claimed and asserted rights under that statute, and the appellee challenged the validity thereof as being repugnant to the Constitution of the United States, and the appellant has the right, on appeal here, to have the judgment and decree of the Circuit Court of Appeals reviewed under 28 U. S. C. A., Section 347 (b) (Judicial Code, Section 240, as amended by Act of February 13, 1925).

STATEMENT OF THE CASE

This is an appeal by the appellant from a final judgment and decree of the United States Circuit Court of Appeals for the Tenth Circuit affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma, and holding invalid, as being repugnant to the Constitution of the United States, the Act of the Legislature of the State of Oklahoma approved April 7, 1925 (Chapter 147, Session Laws of Oklahoma, 1925), declaring the manufacture, sale and distribution of ice to be a public business and placing the same under the jurisdiction

of the Corporation Commission, giving that Commission the power, upon a hearing, to issue a permit or license, providing for a license fee and a penalty for the manufacture, sale and distribution of ice without securing a permit or license as provided for therein.

We shall hereafter refer to this act as the "Ice Act." The applicable provisions of this act appear in the record here at pages 46 to 48 and, for the convenience of the Court, we set out the act in full, omitting the title and date of approval:

"Ice—Manufacture and Distribution:

"Section 1. That the manufacture, sale and distribution of ice within the State of Oklahoma is hereby declared to be a public business, as defined by Section 11032, of the Compiled Statutes of Oklahoma.

"Corporation Commission—License:

"Section 2. That no person, persons or corporation shall be permitted to manufacture, sell and distribute ice within the State of Oklahoma without first having secured a license for such purpose from the Corporation Commission of the State of Oklahoma. The license fee hereunder shall be the sum of fifty cents (50 cents) per ton, per annum, of the daily capacity of ice manufactured, sold or delivered, but the minimum license shall be five dollars ($5.00).

"Same—Hearing:

"Section 3. That the Corporation Commission shall not issue license to any person, firm or corporation for the manufacture, sale and distribution of ice, or either of them, within the State, except upon a hearing had by

said Commission at which said hearing competent testimony and proof shall be presented showing the necessity for the manufacture, sale and distribution of ice, or either of them, at the point, community or place desired. If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community or place, are sufficient to meet the public needs therein, the said Corporation Commission may refuse and deny the applicant (*sic*) for said license. In addition to said authority, the said Commission shall have the right to take into consideration the responsibility, reliability, qualifications and capacity of the person, firm or corporation applying for said license and of the person, firm or corporation already licensed in said place or community, as to afford all reasonable facilities, conveniences and services to the public and shall have the power and authority to require such facilities and services to be afforded the public; provided, that nothing herein shall operate to prevent the licensing of any person, firm or corporation now engaged in the manufacture, sale and distribution of ice, or either of them, in any town, city or community of this State, whose license shall be granted and issued by said Commission upon application of such person, firm or corporation and payment of license fee.

"Hearings—Written Applications:

"Section 4. No hearing as aforesaid shall be had by said Commission except upon written application of the person, firm or corporation applying for said license, which said application shall set forth the name of the person, firm or corporation applying for said license; the city, town or place it is desired to engage in the manufacture, sale or distribution of ice, or either of them; the amount of ice, based on daily tonnage, it is desired to manufacture, sell or distribute therein; the amount of capital to be invested in said undertak-

ing and facts which will show the public need therefor. Upon receipt of said application the Commission shall make an order setting said application down for hearing at a date not less than fifteen (15) nor more than thirty (30) days from the date said application was received and shall give notice of such hearing by mailing a notice thereof to the town or city clerk of the town named in said application wherein it is desired to engage in said business at least ten (10) days prior to the date of said hearing and by publication in some newspaper of general circulation published in said town, city or community at least ten (10) days prior to the date of said hearing. If there be no newspaper published in said town, city or community, then said publication shall be had in some newspaper published elsewhere in the state and of general circulation in said town, city or community.

"Corporation Commission—Powers:

"Section 5. That the Corporation Commission shall have the same power and authority to be charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies, and shall have the same power to fix rates, rules, charges and regulations to be observed by such person, firm or corporation engaging in the manufacture, sale and distribution of ice, or either of them, and the affording of all reasonable conveniences, facilities and service, as it may impose as to the transportation and transmission companies.

"Same—Orders:

"Section 6. All and any orders made by said Commission fixing rates, charges, rules and regulations as

to any person, firm or corporation engaged in the manufacture, sale and distribution of ice, or either of them, may be reviewed on appeal by the Supreme Court of the State of Oklahoma.

"License—Engaging in Business Without:

"Section 7. Any person, firm or corporation who shall engage in the business of manufacturing, selling or distributing ice or engage in either of said businesses, without first obtaining a license, provided for herein, shall be guilty of a misdemeanor and any such person shall be punishable by a fine not to exceed twenty-five dollars ($25.00), and each day's violation shall constitute a separate offense; provided, the Corporation Commission is hereby authorized to promulgate general orders not in conflict with this Act, and to enforce such orders against any person, firm or corporation manufacturing, selling or distributing ice or engaging in either of said businesses, by imposing a fine for the violation thereof not to exceed five hundred dollars for each of said violations.

"Complaints—Hearings:

"Section 8. Any person, persons or corporation aggrieved by any rate, or service, may file an application for a hearing under the terms and conditions of this Act.

"Repealing Clause:

"Section 9. All laws and parts of laws in conflict herewith are hereby repealed."

Section 1 of this Act makes the manufacture, sale and distribution of ice a public business as defined by Section 11032 of the Compiled Statutes of Oklahoma, and this section is:

"11032. Public Business Defined: Whenever any business, by reason of its nature, extent or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price, or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

This section is from Chapter 90, Compiled Oklahoma Statutes 1921, entitled "Trusts and Pools," and the same is set out in full in the appendix, and hereinafter referred to as "Chapter 90." The original act, entitled "Trusts," was passed by the Legislature of the State of Oklahoma and approved June 10, 1908, Session Laws of Oklahoma, 1907-08, page 750, which act is likewise set out in the appendix and hereinafter referred to as the "Original Act." Section 1 of this act provides:

"That every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal."

This is the same as Section 11017 of Chapter 90. Section 13 of the Original Act is the same as Section 11032 of Chapter 90.

The Original Act was carried forward into the Compiled Statutes of Oklahoma, 1909, as Chapter 113, entitled, "Trusts and Combinations." Sections 8800 and 8812, respectively, of this chapter are the same as Sections 11017 and 11032, respectively, of said Chapter 90. Said Original Act was also carried forward in the Revised Laws of Oklahoma, 1910, as Chapter 79, entitled, "Trusts and Pools," and Sections 8220 and 8235, respectively, of this Chapter are the same as Sections 11017 and 11032, respectively, of said Chapter 90.

The appellant complied with the terms and provisions of said Ice Act and obtained from the Corporation Commission a license or permit to manufacture, sell and distribute ice in Oklahoma City, Oklahoma, under the terms and provisions thereof, and was engaged in the manufacture and sale of ice in said city under said license or permit on March 31, 1930, the date of the commencement of this action in the District Court of the United States for the Western District of Oklahoma, and is now and ever since has been so engaged. On and prior to March 31, 1930, the appellee was preparing to engage in the manufacture, sale and distribution of ice in Oklahoma City without complying with said act and in violation thereof.

On March 31, 1930, the appellant herein commenced this action in the trial court against the appellee, seeking to enjoin him from engaging in the manufacture, sale and distribution of ice in said city without complying with said Ice Act. Its complaint appears in the record at pages 1 to 4. The appellant, in its complaint, alleges that said permit or license issued to it by the Corporation Commission for the manufacture, sale and distribution of ice under the provisions of said Ice Act constitutes and is a franchise property right; that it has invested in the business of the manufacture and sale of ice in Oklahoma City under said license or permit a sum in excess of $500,000.00; that the appellee has acquired a site in Oklahoma City for the construction and operation of an ice plant thereon for the manufacture, sale and distribution of ice within said city, and, on February 10, 1930, obtained a building permit from the city authorities for the construction of said building; that shortly thereafter he commenced the building and construction of said plant upon said site for the manufacture, sale and distribution of ice, and is engaged in the process of the construction of said building upon said site; that he has not made an application to said Commission for his license or permit to engage in the manufacture, sale and distribution of ice in said city; that he does not intend to make such application and will, on or about May 15, 1930, commence the business of the manufacture, sale and distribution of ice within said city without complying with said act, in competi-

tion with the appellant, that the appellee has no right to engage in the business of the manufacture, sale and distribution of ice within said city without first having obtained a license or permit from said Commission so to do; that the manufacture, sale and distribution of ice by him within said city without first having obtained a license or permit from said Commission will injuriously affect the business, revenues and properties of the appellant which it has invested in the business of the manufacture and sale of ice in said city under said permit or license, and deprive it of its property without due process of law; that unless he is restrained and enjoined he will commence the business of the manufacture, sale and distribution of ice within said city without complying with said act, and in open violation thereof; that he, in the manufacture, sale and distribution of ice, will cover and include the territory now served and being served by the appellant in the manufacture and sale of ice under its license or permit from said Commission.

The answer of the appellee appears in the record at page [illegible]. In this answer he admits that the appellant is engaged in the manufacture of ice in Oklahoma City under a certain permit issued to it by the Corporation Commission of the State, but specifically denies that such license [illegible] property right, and denies that the value of the property of the appellant invested in the manufacture and sale of ice [illegible] $500,000.00 as alleged in the petition. He admits that he owns the building and

in said city referred to in the complaint of the appellant; that he obtained a building permit from said city to build and construct an ice plant thereon; that he has commenced the building and construction of said plant upon said site and is now in process of the construction of said building; that he admits that he has not made application to the Corporation Commission of the State of Oklahoma for a permit or license to engage in the business of the manufacture, sale and distribution of ice in said city, and that he does not intend to make such application and admits that he will commence the business of the manufacture, sale and distribution of ice in said city in competition with the appellant.

He alleges that he has the right to engage in the business of the manufacture, sale and distribution of ice in said city and that by so doing he will not deprive the appellant of its property without due process of law; that the business of the manufacture, sale and distribution of ice is not in fact a public business and that properties used in connection therewith are not public utilities. He also avers that the appellant, in the manufacture, sale and distribution of ice in said city is not engaged in a public business and that its properties used in connection therewith are not public utilities, and that the Corporation Commission of the State of Oklahoma is without power or authority, and is not charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in Oklahoma;

that it has no power to fix rates, rules, charges and regulations to be followed and observed by persons engaged in the manufacture, sale and distribution of ice.

He also avers that said Ice Act is repugnant to the Constitution of the United States, and particularly Section 10, Article 1 thereof, and the Fourteenth Amendment thereto. In connection with his allegation as to the constitutionality of said Act, he states:

> "Defendant states that he is the owner of the real estate hereinbefore described; that he has constructed a substantial building thereon to be used for the purpose of manufacturing ice therein, and has purchased all necessary machinery, and has expended the sum of about Forty Thousand Dollars therefor; that if he is prevented by the order of this court from using said property in the business of the manufacture, sale and distribution of ice, he will be deprived of his property without due process of law, in violation of the aforesaid provisions of the Constitution of the United States, and will suffer great and irreparable injury."

He also avers that the business of the manufacture, sale and distribution of ice is a private business and not clothed with a public interest; that such business is not carried on under the authority of a public grant or franchise and does not render a public service; that said business does not exercise the right, and has not the power, of eminent domain, nor does it require the use of the streets and highways in any manner not used by the public at large; that such business is not injurious to the public health, safety or morals, but is a useful and necessary occu-

pation; that ice is manufactured or sold in practically every city, town and community in the State of Oklahoma by sundry persons, firms and corporations, and that such business is not and has not been conducted in restraint of trade, and said business is not a monopoly.

The appellee in his answer, as before stated, admits that the appellant was engaged in the manufacture of ice, but denies that it was engaged in the sale and distribution thereof. During the trial of the case in the trial court, the following stipulation was made:

> "It was then stipulated that the law as it is now upon the statute books had been generaly acquiesced in by the industry from the date of its passage to the present time, and that the parties complainant were engaged in the manufacture and sale of ice in Oklahoma City under a permit issued by the Corporation Commission under the provisions of the act in controversy" (R. 44).

Under this stipulation and the admissions of the appellee in his answer, the appellant was engaged in the manufacture and sale of ice in Oklahoma City under a permit duly issued to it by the Corporation Commission under the terms and provisions of said Ice Act.

The case was tried in the trial court on May 22, 1930, and was submitted and taken under advisement on that date (R. 19). At the time of the commencement of this action, the Southwest Utility Ice Company commenced a similar action against the appellee, and the two cases were

tried and submitted together (R. 9-10). The duplicate permit or license issued by the Corporation Commission to the Southwest Utility Ice Company was introduced in evidence by the appellee and such permit or license, omitting the caption and signature of the Corporation Commission, is:

"Know All Men by These Presents: That Southwest Utility Ice Company of Oklahoma City, a corporation, having filed application for license to manufacture, distribute and sell ice in the State of Oklahoma, at Okahoma City, and having shown that it is entitled to license as prescribed by Chapter 147, Session Laws of 1923.

"That said Southwest Utility Ice Company is hereby authorized and licensed by the Corporation Commission to manufacture, distribute and sell ice in the State of Oklahoma, at Oklahoma City, from July 1, 1929, to June 30, 1930, inclusive.

"In Witness Whereof, The Corporation Commission has caused this license to be signed by its Chairman and attested by its Secretary, and its seal affixed thereto, this the 20th day of July, 1929."

The appellant had a similar permit or license, and, according to its terms, it expired on June 30, 1930. The trial court entered its decree on June 24, 1930, and held that said Ice Act was unconstitutional and void, and that the complaint of the complainant was without equity and should be dismissed with prejudice (R. 19). A memorandum opinion was filed by the trial court upon the date of the entry of the decree.

The trial court held that the burden was upon the appellee, and a narrative statement of his evidence appears

in the record at pages 20 to 25. A narrative statement of the evidence of the appellant appears in the record at pages 25 to 44.

The evidence of the appellee consists of the testimony of himself and six others, and deals primarily with the condition of the ice industry in Oklahoma City. His testimony, however, constitutes the major portion of his evidence. The applicable portion of his evidence is:

That he lives in Oklahoma City, and has been a resident of the State for forty-one years; that he has been engaged in the ice business in Oklahoma and Texas since 1903; that at the time said Ice Act was passed he had a plant in Oklahoma City; that there were eight plants there at that time; that he knew of no agreement among the companies to manufacture and sell ice at a certain price prior to the passage of said act; that these eight plants were owned by six companies; that there were eleven plants in Oklahoma City at the time this case was tried, which were owned by three companies; that the price of ice prior to the passage of the Ice Act was hard to fix; that there were different classes of trade, and different prices; that prior to the passage of the Ice Act he (appellee) sold ice for 60 cents cash delivered, 57½ cents per hundred where they took coupons; 40 cents per hundred at the dock; sold to dairymen for 30 cents; that companies in Oklahoma City were generally along that line in price, but there was no

agreement; that cash trade delivery in Oklahoma City now is practically the same price as before; that coupon books are 55 cents per hundred in place of 57½ cents; that dock prices are the same, except outlying towns that are selling now for 50 cents; country town and dairy deliveries are now 35 cents.

That the plant which he (appellee) had built had a daily capacity of between 25 and 30 tons; that he had spent approximately $40,000.00 in building it; that he was ready to commence the manufacture, sale and distribution of ice of May 1, 1930; that he used two men in the operation of his plant—one day and one night man; that it did not require any unusual skill to operate a modern, raw water, electrically driven plant; that the ice business is merely manufacturing and selling a product; that there is no difference between the ice business and that of a butcher, grocer or baker; that there is no material difference between a commercial ice plant and a home refrigerating plant; the principle is the same and both are simple in their construction and operation; that there were a good many individual ice plants in Oklahoma City and other cities of the State; that hotels, restaurants, meat markets and hospitals often have their own plants, as do lots of dairymen.

That between 30 and 40 per cent of ice is sold at the docks in 20, 25, 50 and 100-pound chunks, and the rest of it is hauled in wagons and trucks; that ice can now be

manufactured cheaper than it could be in 1925; that electric power has been reduced some; that the equipment is simpler, and more ice can be handled with an electric hoist than before that improvement.

That ice would stand shipping in a refrigerator car 100 or 125 miles, if it is loaded just ahead of the train that moves it; that you could ship ice a distance of 50 or 75 miles in a car, put it in cold storage, and compete with the man on the ground; this was not practical, but it could be done; that the distance that ice could be carried in a truck and delivered depended on the roads and the season of the year; that ice, with 10 per cent overweight, by carefully covering it, could be delivered to customers over a period or three or four hours before melting, so a customer would lose no weight; that prior to 1925 some ice men sent out scored ice; some did not; that he did not recall any place where there was any material difference in the price of ice in competitive points prior to 1925; that the freight rates on ice are from 8 cents to 10 cents per hundred pounds on distances of 50 or 60 miles; that there is considerable trucking of ice from one place to another.

The appellee testified that in his testimony he had reference to conditions in Oklahoma City; that he could not say whether there were more than six competitive points in the entire State as regards the manufacture and sale of ice in 1925; that he did not believe there were as many as

one-third of the ice plants in Oklahoma in 1925 owned by the electric power companies; that in his judgment $1,500.00 a ton capacity would erect a new raw water ice plant; that there was not much difference in the price of equipment now and the price prevailing in 1925 (R. 20-22).

Some of the other witnesses who testified for the appellee corroborated him in part, and their testimony as a whole is in line with his (R. 22-24).

The evidence of the appellant consists of the testimony of six witnesses, together with certain orders of the Corporation Commission and excerpts from the reports of that Commission to the Governor. Its evidence deals, in a general way, with the condition of the ice industry throughout the state, both before and after the passage of the Ice Act, which we briefly summarize as follows:

Prior to the passage of the Ice Act the Corporation Commission undertook to and did deal, in a general way, with the ice business under the original Trust Act as applied to plants in given communities. On July 27, 1911, the Commission made an order effective August 6, 1911, dealing with the ice business as applied to Oklahoma City (R. 27-28). On July 15, 1921, said Commission made a general order dealing with the ice industry in the state as a whole (R. 28-31). The Corporation Commission, in its annual message to the Governor, in 1915 and in 1916, under the title, "Scope of Legislation," said:

"Pertaining to those utilities which serve the public generally should be broadened. Two conspicuous examples are ice plants and cotton compresses. Chapter 93, Session Laws, 1915, extend the jurisdiction of the Corporation Commission over water, heat, light and power plants, but does not include ice plants. Numerous complaints are received by the Commission each year as to exorbitant prices of ice companies and exorbitant prices charged. The same jurisdiction should be given the Corporation Commission over ice plants as it exercises over gas, electric and water companies" (R. 37-38).

In October, 1918, the Commission, in its annual report to the Governor, dealing with the ice business, said:

"The ice business of manufacturing and distributing ice is as much a matter of public concern as is the business of rendering water, electricity or gas service, and should be subject to the same regulation. Complaints are constantly being made to the Commission in reference to the prices of ice, practices of ice companies or service rendered by such companies, and the Commission has frequently been called upon to exercise jurisdiction under the so-called Anti-Trust law. Specific legislation should be enacted in reference to these companies, and the power of regulation should be made definite and certain" (R. 37).

Campbell Russell was a member of the Corporation Commission for the years 1917 to 1922, inclusive, and in his testimony, with reference to the activities of the Commission for these years, he said that during these years the Commission exercised general jurisdiction over the ice business in the state with reference to rates, practices and service. He then refers to the 1918 report of the Commission to the Governor and with reference thereto says:

> "The occasion for this recommendation was that the Commission felt their power should be made more definite; that the things that brought to the Commission's notice the need of this sort of legislation were complaints of neglect of service, short weight, poor quality of ice and prices that were considered unfair; that from time to time they had ice companies cited before them relative to prices" (R. 37).

He also identified a later report which was made by the Commission to the Governor which embodied substantially the same recommendations contained in the previous reports, except that it contained the statement that complaints had been received from more than one hundred cities and towns of the state (R. 38).

Many years prior to the passage of the Ice Act the Oklahoma Ice Manufacturers Association was organized. W. P. Hill, a witness for the appellant, was the secretary of that association from the fall of 1919 until after the passage of the Ice Act in 1925, and as such secretary was familiar with the ice situation throughout the state, both before and after the passage of the act. This association was organized for the purpose, among others, of correcting the evils and abuses prevalent in the ice industry and to aid and assist the Corporation Commission in its efforts to remedy and correct such evils and abuses. Numerous complaints were filed before the Corporation Commission prior to the passage of the Ice Act and the secretary of the association, under the direction of the Corporation Commis-

sion, investigated these complaints. The complaints as a rule were as to discrimination in service, insufficient weights and exorbitant prices. For some time prior to the passage of the Ice Act, during the ice season, Tuesday of each week was reserved by the Corporation Commission to hear complaints relative to the ice business and the secretary of the association used the remainder of the week in an effort to work out and adjust the various complaints as to individual ice plants throughout the state (R. 25-26).

During the 1924 ice season, complaints before the Corporation Commission had increased quite materially over previous years. During this year the ice peddler system came into existence in Oklahoma City and other points of the state, and many complaints were made against this system. The peddler was an independent dealer, owned his own equipment—might be a horse and wagon or truck; he would start work during the busy season, distribute where he pleased, and then the hot weather was over he would quit and leave the community without ice unless the established dealer there furnished it at a loss (R. 31-32). The peddler took the cream of the business and quit with the cooler weather. Many of the peddlers sold coupon books redeemable by them, and in many instances when the ice season was over they would leave their route without redeeming the unused coupons, and the customer was without relief (R. 32-33). Prior to the passage of the Ice Act, ice wagons as a rule were not equipped with scales, and a very

small portion of the ice sold was scored. By scoring is meant that a block of ice to be delivered as a 300 pound block was frozen at a weight from 12 to 16 pounds greater. It was taken from the storage room, put through a machine with saws which were set so that it divides the ice in correct and differing weights in proportion to the size of the block, that is, in hundreds, fifties, etc. (R. 32). In towns of four or five hundred population there were often several dealers who kept ice, such as the butcher, the merchant, etc. This business was unprofitable, the service was poor, and there were no means of effective regulation and control of this class of business (R. 33).

At the time the Ice Act went into effect there were eleven or twelve communities in the state having more than one ice plant. Among these there were five or six places that had no semblance of competition, and the plants at these places would sell their ice to a common delivery system, which was composed of men who owned and controlled the ice properties. The plant would operate under its corporate name but would be owned in fact by the delivery system. In six or seven points where there might be said to be a semblance of competition, in no place was there any substantial difference in price (R. 31-32). Taking two million inhabitants as a basis of population for 1920, some 235,000 people were residents of points presumably competitive but for the remainder of more than 1,700,000 competition was not possible (R. 32). At the time the Ice Act was

passed there were approximately 160 ice plants in operation in the state, with a capacity of 700,000 tons; this number has not increased more than twenty-five since the act was passed, but the tonnage has materially increased and many plants have been converted from steam or distilled water into what is known as electrically driven raw water plants.

As determined by the hearings before the Corporation Commission, the average cost for erecting an ice plant was $2,500.00 per ton. This varies some with the character of the property on which the plant was constructed and the nature of equipment going into it (R. 31). Prior to 1925, out of 705,000 tons of ice manufactured and marketed in Oklahoma, a little more than one-third of the ice plants were owned by electric public service companies (R. 34), and these companies operated their ice plants as a side line to their public utility business (R. 36).

Prior to the passage of the Ice Act, ice was sometimes sold for 25 cents a hundred to certain classes of trade, but it was what was known as waste ice, white or broken-up ice, that could not be used for domestic purposes, and was often dumped in the cooling tower (R. 34).

The secretary of the Ice Association, dealing with the ice situation since the passage of the act, among other things, said:

The dairy business has made rapid strides in the state on account of the rule of the Corporation Commission requiring the ice companies who have permits to serve the small communities; that in all the communities lying between points supplied by the factory by truck, ice is distributed to farmers upon the ground and produce, such as eggs, butter and milk, are now being produced through the use of ice so they reach the market fresh and salable; that this service has increased the production of this kind of farm product to a marked degree; that large concentrated buying points were established; from these points carloads of butter, chickens, eggs and milk under refrigeration are shippped out daily, and that the market outlet for products of this kind has greatly increased (R. 33). That ice wagons are now required to furnish fresh ice every two and a half hours; that this is accomplished by what is known as relay trucks that leave the plant for routes at designated points; that the relay truck meets the wagon, takes the shrunken ice, credits the driver with it and puts fresh blocks in the wagon; that where larger blocks are used three hours may be sufficient; that blocks come out of the plant weighing 312 to 320 ponuds in order to allow for shrinkage; that these conditions and improvements have been brought about due largely to the requirement of the Commission for full weight; that another requirement of the Commission is that regular deliveries must be made in the forenoon; that prior to the passage of the Ice Act deliveries were most irregular,

and at the present time the public demands and is receiving a better service in ice than before, and that the improved conditions are due primarily to the regulation of the Commission (R. 34).

He also testified that in the United States about twenty per cent of the entire manufactured ice is used in moving food and dairy products to the market; that the exact proportion used in Oklahoma is hard at the present to determine, but that the business has increased since 1925 in spite of inroads made by private refrigeration; that there has been a general average of ice manufactured of more than six per cent per year since 1925, notwithstanding private refrigeration; that the cost of installing a private ice machine will range from two hundred dollars up to as much as you want to pay for it; that private refrigeration was just coming into use in 1925; that whatever growth it has had has come since that time; that since the passage of the Ice Act the trend of prices on ice sold in the state has been downward; that there has been an increase in the use of ice for household purposes; that there has been a decrease in the use of ice for butcher shops, drug stores, etc; that there has been a large increase of ice in rural communities, and the price of domestic ice has been materially reduced (R. 33-34).

He also testified that the ice season in Oklahoma begins about April 15th, extends to about September 15th, and

that the peak of the business is reached about July 15th; that ice is a seasonable product; must be used soon after it is manufactured, and cannot be shipped any considerable distance; that a car of ice will average 18 tons; that in small communities the peak demand will probably be one and one-half to two tons per day; that a car of ice should last about a week but for the shrinkage. The natural result is that toward the latter part of the week the loss in shrinkage is great, the block becomes fragile, easily broken, and cannot be used with satisfaction (R. 35).

Mr. L. J. Lahman, a witness for the appellant, after stating he was familiar with the price of ice in Oklahoma beginning with the year 1925 until the year 1930, said:

That he compiled average figures on the state as a whole which show a decrease in the price to the consumer; that complainant's Exhibit "5" was taken from the prices of retail ice as shown by the records of the Corporation Commission and that the amount saved to the consumer, as shown by these prices, for the various years was as follows:

1926	1927	1928	1929
$55,279.04	$89,715.24	$287,260.80	$328,223.80

and that the estimated saving for the year 1930, based on 715,000 tons production, would be $414,700.00 (R. 38). He also testified that the operating season of the ice business in Oklahoma averaged 116 days in 365, or thirty-two per cent operating season out of the year; that after the passage of

the act in 1925, and in compliance therewith, schedules were filed for towns without manufacturing plants, rural communities and rural routes affecting 378 places; that in 1930 there had been filed with the Corporation Commission 769 schedules covering the same class of locations, an increase in the rural business of the state of more than one hundred per cent coverage; that the result of the rural service had been to increase the production of milk, butter, eggs and fresh vegetables for the farmer; that the dairy business had been developed extensively (R. 39).

He also testified that a large per cent of the ice manufactured and sold goes to the preservation of food, and in this connection stated that approximately fifteen or twenty per cent of the ice manufactured in the State of Oklahoma is consumed in the preservation of food products in transit either from the state out or through the state. He also testified that in the summer time more than fifty per cent of the delivered retail ice goes to the home (R. 40).

L. C. Smith who testified for the appellant is secretary of the National Association of Ice Industries, and had acted in that capacity for thirteen years past; that eighty-four per cent of the ice produced in America was manufactured by members of his association; that the ice business for the last eleven years has increased on an average of 5.35 per cent per year; that in 1914 there were in the neighborhood of 2700 ice plants in the United States; that in 1930 there

were in excess of 6200; that the growth had been under two classifications—one in congested cities and the other in development of perishable products; that the consumption of ice by retail domestic consumers during these years had largely increased; that statistics showed that twenty-nine per cent of the ice produced and used went to the domestic consumer in 1919; that in 1929 forty-seven per cent was consumed by the domestic consumer; that in 1919 the per capita consumption of ice was 712 pounds, and in 1929 it was 1157 pounds per capita (R. 42).

A. J. Authenrieth, a refrigerating engineer of many years experience, testified for the appellant, and among other things, said: That he had made a very extensive study of the use of ice in the transportation of food products throughout the United States; that attempts had been made to find a substitute for ice; that the attempts were unsuccessful; that merchandising of ice differed from the merchandising of other food products in that it was a perishable product, and it must evaporate in order to work or obtain its refrigerating effect; that it must be put to use soon after it is manufactured in order to get the effects of it; that it is a very perishable product and cannot be kept in storage for very long except at very low temperature; that it should be marketed as it comes from the freezing vats; that delivery by wagon to the domestic trade is limited to a radius of from twelve to fifteen miles; that ice could not be shipped without ruinous loss over fifty or seventy-five

miles; that the manufacture of ice is a rather highly specialized business; that in order to produce ice in any plant there are three distinct systems, the ammonia system, the air system and the water system in what is known as the raw water plant; that the production of merchantable ice is a highly specialized thing; that water and air have all to do with the quality of ice you are going to produce; that the water must be specially treated if it comes to your home free from bacteria; that if you get water from city mains, it may be so highly mineralized that you cannot make a clear block of ice out of it that it requires then special air treatment.

He also testified that about twenty per cent of the entire ice produced is now used in the preservation of food and food products in transportation; that ice is the conservator of the nation's food supply; that without it we could not exist; that in 1922 there were loaded in Oklahoma 1676 cars of food products under refrigeration; that in 1925, 2940 cars were so used, and in 1929, 3347 cars were so used (R. 42-43).

Dr. DeBarr, who was head of the Chemistry Department of the University of Oklahoma from 1892 to 1923, testified, among other things, that he had made a study of the use of ice as applied to perishable food products and also as to health conditions of the State; that it conserves the food products by saving them and keeping them in good,

usable condition for a long time; that it conserves the health in furnishing suitable foods and in the cure of disease; that ice bears a very important relation to the dairy business and is necessary in keeping milk, cream, butter and cheese at temperatures necessary for their preservation, and that the growth and production of perishable food products in recent years in the State of Oklahoma has been largely due to the use of ice (R. 41).

In connection with the evidence of the appellant, it was stipulated, as before stated, that the ice industry as a whole, had acquiesced in the Ice Act since its passage (R. 44).

The appellant prosecuted an appeal from the judgment and decree of the trial court to the United States Circuit Court of Appeals for the Tenth Circuit, and that court, on August 27, 1931, entered a final decree affirming the judgment and decree of the trial court (R. 57). The opinion of that court was filed on August 20, 1931.

The two cases—New State Ice Company vs. Liebmann (this case), and The Southwest Utility Ice Company vs. Liebmann—were argued and submitted together in the Circuit Court of Appeals and disposed of in one opinion. Separate appeals, however, were taken to that court and separate appeals have been taken here. The case of The Southwest Utility Ice Company vs. Liebmann is Number 316 here, and a stipulation has been filed in that case to

the effect that, with the approval of this Court, it may abide the judgment of this Court in this case.

The permit or license of the appellant bears date July 20, 1929, and runs from July 1, 1929, to June 30, 1930, inclusive (R. 25). The appellee contended, in the Circuit Court of Appeals, that since this license or permit expired on June 30, 1930, that the appeal should be dismissed because the question involved was moot. At the time the case was tried and disposed of in the trial court, the permit or license was in full force and effect, and the time had not arrived for the appellant to secure a new license. The Circuit Court of Appeals, in discussing this question, said:

> "The last license in the record expired June 30, 1930. Renewals of such licenses are neither pleaded nor proven. This alone would justify an affirmance of the decree below, but, in view of the statement of plaintiff's counsel at the oral argument that such licenses were in fact renewed, we proceed to a consideration of the merits" (R. 48).

We feel that the Circuit Court overlooked the fact that renewals could neither have been pleaded nor proven at the trial of the case because the present licenses had not yet expired, and there was no occasion for getting new licenses, pleading or proving the same. Be that as it may, the Circuit Court of Appeals disposed of the cases upon their merits and relied upon the statement of counsel that renewal licenses had been obtained, and we make the same statement to this Court and respectfully submit that the cases should be disposed of upon their merits.

In this connection we set out in the Appendix the annual license issued to the appellant by the Corporation Commission on June 30, 1930, running from July 1, 1930, to June 30, 1931. We also set out in the Appendix the annual license issued to appellant by the Corporation Commission on July 10, 1931, running from July 1, 1931, to June 30, 1932. These licenses certainly show that the appellant has now, and has had since the institution of this action in the court below, a license duly issued by the Corporation Commission.

SPECIFICATION OF ERRORS

The appellant, in its assignment of errors, assigned two errors which it will urge here, and they are:

> "(1) That said Circuit Court of Appeals erred in holding that the Act of the Legislature of the State of Oklahoma, approved April 7, 1925, being Chapter 147, Session Laws of Oklahoma, 1925, was invalid, on the ground of its being repugnant to the Constitution of the United States.
>
> "(2) That said Circuit Court of Appeals erred in affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma dismissing the bill of the plaintiff therein, the appellant herein, on the ground that said Act was invalid as being repugnant to the Constitution of the United States" (R. 59-60).

SUMMARY OF THE ARGUMENT.

The appellant, under paragraph 9 of Rule 13, filed a statement of the points on which it intended to rely, which statement is:

"Point I.

"That the Act of the Legislature of the State of Oklahoma, approved April 7, 1925 (being Chapter 147, Session Laws of Oklahoma, 1925), is valid, and the United States Circuit Court of Appeals, Tenth Circuit, erred in holding said Act invalid on the ground that it was repugnant to the Constitution of the United States.

"Point II.

"That said Circuit Court of Appeals erred in affirming the judgment and decree of the District Court of the United States for the Western District of Oklahoma, dismissing the bill of the plaintiff therein, the appellant herein, on the ground that said Act was invalid as being repugnant to the Constitution of the United States.

"Point III.

"That said legislative act declares the manufacture, sale and distribution of ice to be a public business, and, under the facts and circumstances as disclosed by the evidence, the manufacture, sale and distribution of ice is a public business, subject to regulation and control by the Corporation Commission of the State of Oklahoma under the terms and provisions of said Act, and said Circuit Court of Appeals erred in holding said Act invalid on the ground of its being repugnant to the Constitution of the United States, and in affirming the judgment and decree of the District Court" (R. 63-64).

and it adopts the same as its summary of the argument.

ARGUMENT

First Proposition

The Act of the Legislature of the State of Oklahoma, approved April 7, 1925 (Chapter 147, Session Laws of Oklahoma, 1925), is valid, and the United States Circuit Court of Appeals, Tenth Circuit, erred in holding said Act invalid on the ground of its being repugnant to the Constitution of the United States.

(Points I, II and III of the Summary.)

The three above named points of the summary may, as we think, be properly argued and presented under the above stated proposition.

If said act is valid, then the license or permit issued to the appellant thereunder by the Corporation Commission is a property right in the nature of a franchise granted in consideration of the performance of a public service, and is within the protection of the Fourteenth Amendment, and, as between the appellant and the appellee, said franchise is exclusive.

Frost v. *Corporation Commission of State of Oklahoma,* 278 U. S. 515, 73 L. ed. 483.

Peoples Transit Co. v. *Henshaw* (8th Cir.), 20 Fed. (2d) 87.

Said act is presumptively valid, and this Court, in considering the same, will assume that if a state of facts could exist that would justify such legislation it actually did exist when the act was passed. If there is reasonable doubt as to

the validity of the act it will be sustained, and the burden is upon the appellee to show a state of facts clearly establishing the invalidity thereof. The wisdom or expediency of the legislation is for the Legislature, but the legislative declaration is not conclusive, and this Court has the right to determine the question of the power of the Legislature to pass the act.

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.

McLean v. *Arkansas*, 211 U. S. 539, 53 L. ed. 315.

Chicago, B. & Q. R. Co. v. *McGuire*, 219 U. S. 549, 55 L. ed. 328.

German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389. 58 L. ed. 1011.

Corporation Commission v. *Lowe*, 281 U. S. 431, 74 L. ed. 945.

South Utah Mines & Smelters v. *Beaver County*, 262 U. S. 325, 67 L. ed. 1004.

Toombs v. *Citizens Bank*, 281 U. S. 643, 74 L. ed. 1088.

Section 15, Article 9 of the Constitution of the State of Oklahoma creates the Corporation Commission. Section 18 of this article confers the power and authority upon said Commission as to the regulation and control of all transportation and transmission companies doing business within the State. Section 19 of this article deals with the power and authority of the Commission, and, among other things, provides:

"The Commission may be vested with such addi-

tional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith."

The Legislature in Section 13 of the original Trust Act of June 10, 1908 (Session Laws of Oklahoma, 1907-08, page 750), hereinbefore referred to, conferred additional powers upon the Corporation Commission. After the passage of this act, said Commission undertook to, and did in a limited way, regulate and control the price, service and practice of the ice industry as applied to individual plants in given cities and towns of the State. An application was made to the Commission by a citizen of Holdenville, Oklahoma, to regulate the price of ice sold by the Oklahoma Light & Power Company in that city. That company operated a light and power plant in Holdenville, and in addition thereto, manufactured and sold ice. It was claimed that the price of ice was excessive, and the jurisdiction of the Commission was invoked to inquire into, determine and fix a price for which ice might be sold in that city. Said light and power company brought an original proceeding in the Supreme Court for a writ of prohibition challenging the right and power of the Commission to exercise the jurisdiction invoked. The Supreme Court denied the writ and upheld the power and authority of the Commission to in-

quire into, determine and fix the price for which ice might be sold in Holdenville. *Oklahoma Light & Power Co.* v. *Corporation Commission*, 96 Okla. 19, 220 Pac. 54.

It was contended in this case that the power to regulate by the Commission under Section 13 of the original Trust Act (11032, Chapter 90, Compiled Oklahoma Statutes, 1921), applied only to business in restraint of trade as defined in Section 1 of said original Trust Act (11017, Chapter 90, Compiled Oklahoma Statutes, 1921), and that the rule theretofore announced by the Supreme Court of the State in *Shawnee Gas & Electric Co.* v. *Corporation Commission*, 35 Okla. 455, 130 Pac. 127, and *Oklahoma Gin Co.* v. *State*, 63 Okla. 10, 158 Pac. 629, supported that contention.

The Supreme Court, in *Shawnee Gas & Electric Co.* v. *Corporation Commission, supra*, quoted approvingly from an unpublished opinion of Justice Hayes of that Court in an unnamed case. This unpublished opinion was likewise quoted approvingly by the Supreme Court in the case of *Oklahoma Gin Co.* v. *State, supra.* Justice Hayes wrote the opinion for the Court in the case of *Shawnee Gas & Electric Co.* v. *State ex rel Shawnee Waterworks*, 31 Okla. 505, 122 Pac. 222, and announced this rule:

> "This Court is without jurisdiction to review on appeal an order of the Corporation Commission prescribing a schedule of rates to be charged by a gas company for gas it distributes to its patrons."

In the concluding part of this opinion it is said:

> "It follows that from these views the opinion and judgment heretofore rendered herein should be set aside, and this appeal dismissed."

Our investigation leads us to believe that this is the case referred to by the Supreme Court in the above cited cases and that the unpublished opinion quoted from was the first opinion written and filed in that case, and that later that opinion was withdrawn and the opinion reported filed, and that as a matter of fact the quoted unpublished opinion never was published.

The Supreme Court, in *Oklahoma Light & Power Co.* v. *Corporation Commission, supra,* refers to these two previous decisions, distinguishes them, and holds in effect that the rule therein announced is too narrow. We quote the following:

> "While we consider these opinions essentially correct in principle, yet it is clear from a careful consideration of the same that a much narrower construction is placed upon Section 13 of the Act, *supra* (Section 11032, Comp. St. 1921). than the language used in said section will justify."

The Court also held in this case:

> "Upon a careful consideration of the act in question, we have no difficulty in concluding that the purpose of the act is two-fold: First, to define a trust on monopoly and provide for prosecution. Second, the regulation of any business when conducted under any of the following circumstances: Where the business, by reason of its nature, extent or existence of a virtual monopoly therein, is such as to clothe it with a public

interest of such nature that is of legal cognizance, and where the consideration taken by the business or commodities bought or sold therein are offered or taken by purchase or sale in such manner as to materially affect the public as to supply, demand, price or rate thereof, or if the business is conducted so as to come within the statutory characteristics and thereby affects the public interest to such an extent as to be of public consequence, then the statute authorizes the Commission to regulate.

* * * * * * * * *

"In the case of *Oklahoma Gin Co.* v. *State, supra,* it will be noticed the court substitutes the word 'and' in the place of the disjunctive 'or' used in the statute, and thereby destroyed the plain intention of the Legislature, as evidenced by the language used.

* * * * * * * * *

"We are clearly of the opinion that the first section of the act defined an unlawful agreement, contract, or combination in restraint of trade or commerce and declared and made the same illegal, and in subsequent sections of the act provided for the prosecution, dissolution and punishment of such combination. It will here be observed if such a trust is dissolved and restrained from doing business, the regulation provided for in Section 13 would have no application to such a business. Section 13 of said act plainly provides for the regulation of any business which by reason of its nature and extent, or in the event of a virtual monopoly therein, is such that the public must use the same or its services, or such business sells commodities in such a manner as to make it of public consequence so as to affect the community at large as to supply, demand or price, or rate thereof—that then such business is subject to regulation. The right to regulate under Section 11032 of the statute depends upon the established facts in each particular case.

* * * * * * * * *

"It is clear from Section 13 of the act that it was the legislative intent to vest the Corporation Commission with power to regulate a business by reason of its nature and extent that makes it of public consequence or affects the public interest in such a way as to demand regulation, or where such business is of such a nature as to result in a virtual monopoly therein to the persons engaged in such business to such an extent as to place it within the power of such persons to control the supply and demand for the practices, prices, rates and charges of such business.

"It is our conclusion that the business subjected to regulation under the first part of Section 13 of the act, *supra*, falls within that class of business described as the third class subject to public regulation by Chief Justice Taft in the case of *Wolff Packing Co.* v. *The Court of Industrial Relations of Kansas*, 262 U. S. 522.

* * * * * * * * *

"The manufacture, sale and distribution of ice in many respects closely resemble the sale and distribution of gas as fuel, or electric current, and in many communities the same company that manufactures, sells and distributes electric current is the only concern that manufactures, sells and distributes ice, and by reason of the nature and extent of the ice business it is impracticable in that community to interest any other concern in such business. In this situation, the distributor of such a necessity as ice should not be permitted by reason of the impracticability of any one else engaging in the same business to charge unreasonable prices, and if such an abuse is presisted in, the regulatory power of the State should be invoked to protect the public."

The Supreme Court, in this case, clearly holds that the Corporation Commission under the original act, prior to the passage of the Ice Act, had the authority to fix and

regulate the price of ice as to an individual plant in a given locality under Section 13 of the original Trust Act, without regard to Section 1 thereof, and that the rule theretofore announced by the Supreme Court in the cases of *Shawnee Gas & Electric Co.* v. *Corporation Commission*, *supra*, and *Oklahoma Gin Co.* v. *State*, *supra*, was limited and modified. See also, *Consumers Light & Power Co.* v. *Phipps*, 120 Okla. 223, 251 Pac. 63.

The Supreme Court of Oklahoma also held that the Corporation Commission might fix and regulate the price of ginning cotton under the original Trust Act. *Harris-Irby Cotton Co.* v. *State*, 31 Okla. 603, 122 Pac. 163. It was held, however, in this case that such an order was not an appealable one. The case of *Oklahoma Gin Co.* v. *State*, *supra*, dealt with the power and authority of the Corporation Commission to fix the price for ginning cotton under the original Trust Act, and reaffirmed its authority so to do, but in so holding tied together Sections 1 and 13 of said original Trust Act.

About this time the Corporation Commission undertook to fix and regulate the price of laundry in Oklahoma City under Section 13 of the original Trust Act (Section 8235, Chapter 79, Revised Laws of 1910), and made an order having that effect. Its right to make such an order was challenged, and it was contended, among other things, that said order was void because there was no right of judicial

review except by way of defense to proceedings for contempt for violating the same. This Court held the order void on this account. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 64 L. ed. 596. The case of *Oklahoma Gin Co.* v. *State, supra*, came to this Court and was reversed for the same reason. *Oklahoma City Co.* v. *State of Oklahoma*, 252 U. S. 339, 64 L. ed. 600.

On March 22, 1915, the Oklahoma Legislature passed an act (Chapter 176, Session Laws of Oklahoma, 1915), declaring cotton gins a public utility. Section 1 of this act is:

> "That cotton gins are hereby declared to be public utilities, and the operation of same for the purpose of ginning seed cotton is declared to be a public business."

This act was assumed valid by the State Supreme Court in the case of *Sims* v. *State*, 80 Okla. 254, 196 Pac. 132. See also *Planters Cotton & Ginning Co.* v. *West Bros.*, 82 Okla. 145, 198 Pac. 855. In *Frost* v. *Corporation Commission*, 278 U. S. 515, 73 L. ed. 483, the parties thereto conceded the act valid and this Court assumed it valid for the purpose of the decision in that case. In April, 1930, the Circuit Court of Appeals for the Tenth Circuit held the act valid. *Chickasha Cotton Oil Co.* v. *Cotton County Gin Co.*, 40 Fed. (2d) 846.

The Cotton Act (Sections 3712-3715, Compiled Oklahoma Statutes, 1921), declares cotton gins to be public utilities, forbids operation without license to be

granted by the State Corporation Commission, and provides for regulation by the Commission. The Tenth Circuit, as before stated, in the above cited case, held this act valid, and we think the rule announced in that case supports our contention as to the validity of the Ice Act.

In 1916 the Corporation Commission of the State, in *Garner* v. *Tulsa Ice Co.*, P. U. R. 1917C 613, treated and regarded the ice business as affected with a public interest and ordered an ice company to furnish a drug store ice at the same rate which it was furnishing a meat market. This holding was under the original Trust Act. The Supreme Court of the State in 1923, in *Oklahoma Light & Power Co.* v. *Corporation Commission, supra,* treated the ice business as affected with a public interest and subject to regulation and control as to practices and prices under the original Trust Act. There were many abuses and evils in the industry prior to the passage of the Ice Act, and, as before stated, the Corporation Commission endeavored to remedy these evils and abuses. Its power in that regard was limited. The Commission, whose duty it was to protect the public against these evils and abuses, through a period of years called to the attention of the Governor the defects in the anti-trust act as regards its power to regulate and control the prices and practices of ice companies, and urged additional legislation, and as a result of many years discussion of the evils existing as to the ice industry, the Ice Act was passed in 1925. This act was acquiesced in and

treated as valid by the ice industry for a period of five years after its enactment. There was but little or no competition in the ice industry prior to the enactment of the Ice Act. Public service corporations owned one-third of the plants and operated them in connection with their public utility business. The evidence discloses that conditions have noticeably improved in the ice industry since the passage of the act. These improved conditions are not, of course, all due to the passage of the act, because there have been improved conditions in the industry in other States, but it is fair to assume, as we believe, from the evidence in this case, that the major portion of the improved conditions are traceable to the act. Ice is an article of common household necessity, the supply of which must ordinarily be purchased every day. The use of it has and will play a prominent part in the growth and development of the rural communities of the State, the health and comfort of its citizens, and promote the general welfare of the State, and properties used and committed to the manufacture, sale and distribution of ice may reasonably, as we believe, be treated and regarded as utilities subject to regulation and control, and that the State, in the exercise of its police power, for the common good, had the right, in our judgment, to enact the Ice Act.

This Court will take notice of the climatic conditions of Oklahoma, and we think a state of facts did exist at the time of the passage of the Ice Act justifying its enactment.

The evidence of the appellee certainly does not of itself show a state of facts justifying this Court in declaring the act invalid, and, considering the presumptions prevailing as to the validity of a State statute, we believe the act is constitutional under the rule announced by this Court in the following cases:

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.

Budd v. *State of New York*, 143 U. S. 517, 36 L. ed. 247.

Brass v. *State of North Dakota* (Stoeser), 153 U. S. 391, 38 L. ed. 757.

Spring Valley Waterworks v. *Schottler*, 110 U. S. 347, 28 L. ed. 173.

Noble State Bank v. *Haskell*, 219 U. S. 104, 55 L. ed. 112.

German Alliance Ins. Co. v. *Lewis*, 233 U. S. 389, 58 L. ed. 1011.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 67 L. ed. 1103.

Terminal Taxicab Co. v. *Kutz*, 241 U. S. 252, 60 L. ed. 984.

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 75 L. ed. 324.

Liberty Warehouse Co. v. *Burley Tobacco Growers Coöperative Marketing Assn.*, 276 U. S. 71, 72 L. ed. 473.

Texas & Pacific Ry. Co. v. *Gulf, Colorado & Santa Fé Ry. Co.*, 270 U. S. 266, 70 L. ed. 578.

The act not only gives the right of regulation and control as to prices and practices, but gives the added right of

determining whether or not the public necessity and convenience require an ice plant or additional ice plant facilities in a given community. This right, as we view it, is essential in order to give proper and effective regulation of prices for the common good, because if the Commission is without authority to determine when and under what circumstances an ice plant shall be built and constructed in a given community without regard to the necessity therefor from a public standpoint, then in the end the public will suffer. The act, we believe, may be distinguished from and is not controlled by the rule announced by this Court in:

Tyson & Bro. v. *Banton*, 273 U. S. 418, 71 L. ed. 718.

Williams v. *Standard Oil Co.*, 278 U. S. 235, 73 L. ed. 287.

Ribnik v. *McBride*, 277 U. S. 350, 72 L. ed. 916.

Fairmont Creamery Co. v. *State of Minnesota*, 274 U. S. 1, 74 L. ed. 893.

Oklahoma is the only State of the Union, so far as our information goes, which has declared the manufacture, sale and distribution of ice a public business. This is no reason, of course, why the act should be stricken down. Arkansas passed a similar act, and the Supreme Court of that State sustained the act as to prices, rates, discrimination, and other matters incident thereto, but held invalid that portion of the act giving the Railroad Commission the power to deny one the right to engage in the business in a given community, irrespective of the necessity.

Cap F. Bourland Ice Co. v. *Franklin Utilities Co.*, 180 Ark. 770, 22 S. W. (2d) 993, 68 A. L. R. 1018.

There are some State Court decisions which we believe are helpful in support of our contention, some of which are:

Holton et al. v. *City of Camailla* (Ga.), 68 S. E. 472.

Laughlin v. *City of Portland* (Me.), 90 Atl. 318.

City of Tombstone v. *Macia* (Ariz.), 245 Pac. 677.

City of Denton v. *Denton Home Ice Co.* (Tex.), 18 S. W. (2d) 606.

City of Denton v. *Denton Home Ice Co.* (Tex.), (on rehearing), 27 S. W. (2d) 119.

The Circuit Court of Appeals, in its opinion, refers to the Ice Blue Book, published in 1928, which purports to give the price of ice for certain named southern States, including Oklahoma. We respectfully submit that this book should not be taken as authority as to the ice prices prevailing in the various States referred to therein, because labor and other conditions existing in the different States referred to might play a prominent part as to the price of ice, and we submit that the evidence in this case taken as a whole, shows a decline in the price of ice, improvement in the service, kind, quality and character of ice, after the passage of the act, and that the evils which the act sought to remedy have, in part at least, been remedied.

The court also, in the concluding part of the opinion,

casts doubt upon the right and power of the Corporation Commission of the State with reference to the regulation of the price of ice. We quote:

> "It is our conclusion that, while ice is an essential commodity, there is both potential and actual competition in such business sufficient to afford adequate protection to the public from arbitrary treatment and excessive prices. With such competition existing in the business, we seriously doubt that the manufacture of ice is so affected with a public interest as to justify the fixing of prices at which the commodity shall be sold, and we hold that it is not so affected to the extent required to warrant the more serious invasion of the rights of the citizens by limiting the number of persons who may engage in such business in a given territory."

It was contended by the appellee in the Circuit Court of Appeals that said Ice Act was invalid for the reason that there existed no right of judicial review from the action of the Corporation Commission in granting or denying a permit or license to engage in the manufacture, sale and distribution of ice. Section 5 of said act provides:

> "That the Corporation Commission shall have the same power and authority to be charged with the duty of regulating and controlling the manufacture, sale and distribution of ice in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies, and shall have the same power to fix rates, rules, charges and regulations to be observed by such person, firm or corporation engaging in the manufacture, sale and distribution of ice, or either of them, and the af-

fording of all reasonable conveniences, facilities and service as it may impose as to the transportation and transmission companies."

Section 18 of Article 9 of the State Constitution confers the power and authority upon said Commission as to the regulation and control of all transportation and transmission companies doing business within the State, and under said Section 5 of said Ice Act the same powers are conferred upon the Commission with reference to the ice business.

Section 20 of Article 9 of the Constitution provides for appeals from the Corporation Commission to the State Supreme Court as to transportation and transmission companies, and that no other court, except the Supreme Court by way of appeal, shall have jurisdiction to revise, reverse, correct or annul any action of the Commission within the scope of its authority. This article also provides that the Legislature may, by general laws, provide for appeal from any action of the Commission by the State, or by any person interested, irrespective of the amount involved.

The State Supreme Court, in the case of *Harris-Irby Cotton Co.* v. *State, supra,* held that an order made by the Corporation Commission as to prices for ginning cotton under the original Trust Act was not an appealable order, but the Supreme Court has never held that an appeal would not lie from any order of the Corporation Commission with reference to the ice business or the granting or denying

of a permit or license to manufacture, sell and distribute the same. In the case of *Pioneer Telephone & Telegraph Co.* v. *State*, 40 Okla. 417, 138 Pac. 1033, it was held:

> "Three remedies are available to the appellant by which the validity of said order might be challenged: (1) By appeal as provided in Section 20 of Article 9 (Section 238, Williams' Ann. Ed.) of the Constitution; (2) by application made directly to the Commission to set aside order (Section 18 of Article 9 [Section 234, Williams' Ann. Ed.] of the Constitution); and (3) by an action in equity to restrain its enforcement. As a matter of practice the first two remedies should be sought before the last remedy is resorted to. *Prentiss* v. *Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.
>
> "Section 6, Article 2 (Section 14, Williams' Ann. Ed.) of the Constitution of this State, provides that:
>
> " 'Courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.'
>
> "By this provision the right of the appellant to maintain a proceeding to invoke the equitable powers of a court to enjoin its enforcement is guaranteed. True, Section 20 of Article 9 provides that:
>
> " 'No court of this State (except the Supreme Court, by way of appeal as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the Commission within the scope of its authority, or to suspend or delay the execution or to suspend or delay the action or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties.'
>
> —but in view of the holding of the Supreme Court of

the United States in *Prentiss* v. *Atlantic Coast Line, supra,* this provision cannot be construed as denying the remedies guaranteed by Section 6 of the Bill of Rights.

• • • • • • • • • •

"Following the rule laid down in the Prentiss case, we have no other alternative than to hold that, by virtue of Section 6 of the Bill of Rights, the direct proceeding in a court exercising equity powers in the district and superior courts of this State was available to appellant to challenge the validity of the order."

We submit that under the authority of this case one aggrieved by the action of the Corporation Commission in granting or denying an application for a permit or license to engage in the ice business could appeal direct to the Supreme Court, or bring an action in equity in any court of record of the State to restrain the enforcement of the order complained of. See also, *Frost* v. *Corporation Commission*, 26 Fed. (2d) 508.

Section 6 of the Ice Act provides:

"All and any orders made by said Commission fixing rates, charges, rules and regulations as to any person, firm or corporation engaged in the manufacture, sale and distribution of ice, or either of them, may be reviewed on appeal by the Supreme Court of the State of Oklahoma."

This provision may not be broad enough within itself to include the right of appeal from an order granting or denying a permit or license. Be this as it may, the right of appeal from such an order is not expressly denied under

the act, and we think such a right is granted by the Constitution itself under the rule announced in *Pioneer Telephone & Telegraph Co.* v. *State, supra.*

Prior to the opinion of this Court in the case of *Oklahoma Operating Co.* v. *Love, supra,* the State Legislature passed Chapter 52, Session Laws of Oklahoma, 1919, page 86 (Sections 11046-11050, Article 2, Chapter 60, Compiled Oklahoma Statutes, 1921), relating to procedure and appeals for violation of the Anti-Trust Laws. This statute was referred to by this Court in its opinion in the above case.

The Corporation Commission, in the performance of its functions, exercises judicial, executive and legislative powers. *Muskogee Gas & Electric Co.* v. *State,* 81 Okla. 176, 186 Pac. 730; *Pioneer Telephone & Telegraph Co.* v. *State,* 40 Okla. 417, 138 Pac. 1033, *supra; Frost* v. *Corporation Commission,* 26 Fed. (2d) 508, *supra.* We understand that the Corporation Commission, in denying or granting a license to manufacture, sell and distribute ice, acts in a quasi-judicial capacity, but in whatever capacity it may act, a judicial review is provided for under the Constitution and laws of the State.

The State statute (Chapter 176, Session Laws of Oklahoma, 1915; Sections 3712-3715, Compiled Oklahoma Statutes, 1921), declaring cotton gins to be public utilities, as before stated, is similar in its terms and provisions to the Ice Act. Section 5 of the Cotton Act is:

"The orders made by said Commission fixing rates, charges, rules and regulations as to any persons or corporation operating any gin or gins may be reviewed on appeal by the Supreme Court in the same manner, form, jurisdiction and procedure as applied to such orders made relative to transportation and transmission companies."

This section may be considered limited in its scope as to the right of appeal, and probably does not, by express terms, grant the right of appeal from an order granting or refusing a license, but the Supreme Court of the State has held that an appeal would lie from the order of the Commission refusing a permit. *Baker* v. *Capshaw*, 130 Okla. 86, 265 Pac. 115. Baker owned and operated a five-stand cotton gin at Hobart, Oklahoma; he desired to increase the capacity by adding four additional gin stands; he made application to the Commission for permission or license so to do, as provided for under the Cotton Gin Act. A hearing was had and the application was denied. He did not appeal, but sought a writ of prohibition. The writ was denied, and the Court, in the concluding part of the opinion, said:

"If plaintiff was not satisfied with the order of the Corporation Commission, his remedy clearly was by appeal."

See, also, *In re. Farmers Coöperative Gin Co.*, 122 Okla. 115, 251 Pac. 729.

Since the Supreme Court has definitely held that a right of appeal did exist from the order of the Corporation

Commission denying a permit under the Cotton Gin Act, we respectfully submit that it would hold that the appellee, if he had made an application for a license to manufacture, sell and distribute ice and his application had been denied, had the right of review by appeal to the Supreme Court.

On March 28, 1923, the State Legislature passed what is known as the Motor Vehicle Transportation Act, Chapter 113, Session Laws of Oklahoma, 1923, page 188. This act confers upon the Corporation Commission the power to grant permits or licenses upon a showing of public convenience and necessity therefor. No specific right of appeal is allowed, but the Supreme Court, in *Ex Parte Tindall*, 102 Okla. 192, 229 Pac. 125, held that the right of appeal existed. We quote:

> "Sections 18 and 19 of Article 9 of the Constitution specifically confer certain powers upon the Corporation Commission, and specifically authorize the Legislature to confer additional powers upon such Commission; and Section 20, *Id.*, grants an appeal from orders of the Corporation Commission to this Court, hence the provisions of an act conferring certain powers of the same nature and character as those specifically conferred by the Constitution itself are not rendered unconstitutional merely because the act fails to provide for an appeal, inasmuch as the right of appeal provided for in Section 20, Id., automatically vests in any party aggrieved by the enforcement of such power."

A right of judicial review certainly exists under the Constitution and laws of Oklahoma from an order of the

Corporation Commission denying or granting a permit for the manufacture, sale and distribution of ice, and the Ice Act is constitutional.

Wadley Southern Railway Co. v. *State of Georgia*, 235 U. S. 651, 59 L. ed. 405.

CONCLUSION

We respectfully submit: (1) that the manufacture, sale and distribution of ice is a public business affected with a public interest, and that the act of the Legislature of the State of Oklahoma approved April 7, 1925 (Chapter 147, Session Laws of Oklahoma, 1925), is valid, and that the Circuit Court of Appeals erred in holding said act as being repugnant to the Constitution of the United States; and (2) that a right of judicial review exists under the Constitution and laws of the state from an order granting or refusing a permit for the manufacture, sale and distribution of ice and that the judgment and decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

JOHN B. DUDLEY,
J. H. EVEREST,
GUY L. ANDREWS,
Counsel for Appellant.

RAINEY, FLYNN, GREEN & ANDERSON,
Of Counsel.

APPENDIX

ORIGINAL ACT. Effective June 10, 1908. Session Laws of Oklahoma, 1907-08, page 750.

TRUSTS

Defined and Regulated.

ARTICLE I.

An Act to define a trust, monopoly, unlawful combination in restrain of trade; to provide civil and criminal penalties and punishment for violation thereof and damages thereby caused; to regulate such trusts and monoplies; to promote free competition for all classes of business in the State; and declaring an emergency.

Be It Enacted by the People of the State of Oklahoma:

Section 1. That every act, agreement, contract or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal.

Section 2. If the Attorney-General shall have sufficient evidence that the provisions of the Constitution, or any law pursuant thereto against the establishment or maintenance of any trust, monopoly or unreasonable restraint of trade, or any violation of this Act, or any of its provisions, are about to be or have been violated by any person, firm, corporation or association engaged in any quasi-public business or having a virtual monopoly of any commodity or business with the intention or effect of destroying competition or restraining trade, contrary to the provisions of this Act, he may file information in the Supreme Court, and by proceeding as against nuisance, enjoin and restrain said combination or arrangement, or any of its members, or by a proceeding analogous to libel, cause any or all the personal property of said offending person, firm or corporation or association, used or to be used, in whole or in part, in any transaction which, in effect or in-

tent, hinders competition, or unreasonable restriction of trade, to be forfeited to the State in the discretion of the court, together with all the commodities in the possession or control of such offending corporation, person, firm or association, used or intended for such use in violation of the Constitution or laws pursuant thereto, or this Act, and may take both said proceedings. Upon the filing of such petition, or at any time thereafter, the Attorney-General may apply for an injunction pending the action, and the appointment of a receiver for any or all of the property of such person, firm, corporation or association. Upon such application, the court, or a majority of the judges thereof, if in vacation, is authorized to issue a restraining order pending the action, enjoining the defendant or defendants from in any way changing the business, records, books, instruments or property to them belonging, or by them used, directly or indirectly, and issue a rule to show cause why a receiver should not be appointed, and after notice of such rule shall have been served on the defendant or defendants or any managing agent of said defendant or defendants within the State, and an opportunity to be heard having been given, said receiver may be appointed in the discretion of the court, to take charge of the property of the defendant or defendants so notified.

Such receiver shall preserve said property free from any illegal arrangement until the termination of the litigation, and thereafter to dispose of the same according to law, or any other remedy may be applied, or both, to more effectually produce and consummate such preservation or forfeiture or both; and said court shall be authorized by appointed master in chancery, or otherwise, in its discretion, to receive evidence in any county in the State, according to the rules of civil procedure, and make findings of fact thereon for said court; and said master in chancery shall have compulsory process for witnesses, and the production of books and papers from any part of the State, and for this purpose the executive officers of the said court, or any of the district courts of this State, shall be empowered to serve mense and final process; and the services

of said master in chancery, or other person appointed by the court, shall be paid for as costs by the losing parties in said cause, in an amount equal to the fees that would have been earned therein if a notary public had received said testimony, together with a sum of not exceeding ten dollars ($10.00) per day, in the discretion of the court, and the actual expenses for each day that testimony is actually received, and testimony and evidence in such action may also be taken by deposition anywhere within or without this State, as in civil actions in the district court. In the event of a violation of any order of the court therein, and a proceeding grows out of the same in the nature of contempt, if the defendant demand a trial by jury, the court may transfer the said contempt proceedings to any district court of the State for trial by jury and a verdict, but the judgment, if any, shall be rendered by said Supreme Court, and sentence, if proper, passed by it. This proceeding shall be in addition to, and cumulative as to any other provisions of the law applicable to the same situation.

Provided, that the appointment of such receiver may be stayed, or after appointment and possession taken the receiver shall be discharged, upon the defendant giving bond in an amount, and with the sureties to be approved by said court or a justice thereof, conditioned for the payment of all damages and costs which may be assessed against the defendant in said proceeding in favor of the State, or any officer or person.

Section 3. Any person, firm, corporation or association, who shall be injured in his or their business or property by any other person, firm, corporation or association, by reason of anything forbidden, or declared to be unlawful by this Act, may sue therefor in the courts of this State, and shall recover threefold the damages by him or them sustained, and the cost of suit, and a reasonable attorney's fee, to be fixed by the court.

Section 4. Every foreign corporation, as well as every foreign association exercising any of the powers, franchises or functions of a corporation in this State, vio-

lating any of the provisions of this Act, is hereby denied the right and prohibited from doing business in this State, and the Secretary of State, upon the order of the Corporation Commission, or any competent court, made after due notice and in due course of law, shall revoke the license of any such corporation or association heretofore authorized to do business in this State.

Section 5. It shall be unlawful for any person, firm, corporation or association engaged in the production, manufacture, distribution or sale of any commodity of general use, or rendering any service to the public, to discriminate between different persons, firms, associations or corporations, or different sections, communities or cities of the State by selling such commodity, or rendering such service at a lower rate in one section, community, or city than another, or at the same rate or price at a point away from that of production or manufacture as at the place of production or manufacture, after making due allowance for the difference, if any, in the grade, quantity or quality, and in the actual cost of transportation from the point of production or manufacture, if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition, or restriction of trade.

Section 6. Any person who shall violate any of the provisions of this Act, or take part, or aid, or advise in the violation of any such provisions, or who shall, as officer, manager, director, agent, servant or employe of any firm, corporation or association, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information, knowingly, to assist in carrying out such purposes, or in pursuance thereof, in violation of said provisions, shall be punished by a fine of not less than fifty dollars, nor more than ten thousand dollars, and by imprisonment not less than ten days, nor more than ten years, at the discretion of the court; and each day's violation of the provisions, or any of them, of this Act, shall constitute a separate offense. And any sum which might be assessed as a fine by way of punishment for a crime as in this Act provided, may be recovered by the State as a penalty in civil

action in addition to, or irrespective of, the assessment and assessability of said fine, either before, after, or simultaneously with the pendency of said criminal action.

Section 7. In any indictment or information for any offense named in this Act, it is sufficient to state the purpose or facts of the trust, monopoly, unlawful combination in restraint of trade or commerce, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purpose without giving its name, or description, or stating how, when and where it was created.

Section 8. It shall be the duty of the court before whom any proceeding under this Act may be brought, upon the application of the Attorney-General, to cause to be issued by the clerk of said court subpoenas for such witnesses as may be named in the application, and cause the same to be served by the sheriff of the county where or whither such subpoena is issued; and such witnesses shall be compelled to appear before such court or judge, at the time and place set forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this Act; and any witness who fails or refuses to attend and testify shall be punished for contempt, as provided by law. Any person so subpoenaed and examined, shall not be liable to criminal prosecution for any violation of this Act about which he may testify, neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all the witnesses shall, at the option of the Attorney-General, be taken down and shall be transcribed and placed in the hands of the Attorney-General, and he shall be authorized to prosecute such violator or violators of this Act as the testimony so taken shall disclose. Witnesses subpoenaed as provided in this Act, shall be compelled to attend from any county in the State.

Section 9. It shall be the duty of the county attorney of the several counties of this State, as well as the Attorney-General of the State, to prosecute all actions to enforce the criminal provisions of this Act.

Section 10. It shall be unlawful for any person, partnership, firm, association, corporation or joint stock company, or agent thereof, to issue, or to own, trust certificates, or for any person, firm, partnership, association, joint stock company or corporation, agent, officer, employe, or the director or stockholders of any corporation, association or joint stock company to enter into any combination, contract or agreement with any person or persons, corporations or associations, firm or firms, partnership or partnerships, or with any stockholder, director or officer, agent or employe of the same, the purpose or effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the conduct or operation of the same, or the output or manufactured product thereof, or the marketing of the same in the hands of any trust or trustees, holding corporation or association, firm or committee, with the intent or effect to limit or fix the price, or lessen the production or sale of any product or article of commerce, or the use or consumption of the same, or to prevent, restrict, limit or diminish the manufacture or output of any such article of commerce, use or consumption, and every person, firm, partnership, association, joint stock company or corporation, or any agent, employe, officer or director of the same, that shall enter into any such combination, contract, management or agreement for the purpose aforesaid, shall be deemed and adjudged guilty of conspiracy in restraint of trade, and punished as provided for in Section 6 of this Act, insofar as applicable, provided, this section shall not be construed to extend beyond the scope and meaning of Section 1 of this Act.

Section 11. Every corporation who shall own, hold or control, in any manner whatever, the stock of any competitive corporation or corporations engaged in the same kind of business, in or out of this State, in violation of the Constitution and laws of this State, shall forfeit its charter or license to do business in this State, and shall be subject to a penalty of not less than one thousand dollars, nor

more than ten thousand dollars, to be recovered at the suit of the State in any court of competent jurisdiction.

Section 12. Whenever any corporation created under the laws of this State, or any foreign corporation authorized to do business in this State shall violate any law of this State, for the violation of which fines, penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which may hereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties, and for all costs of suit, and of collection. The State of Oklahoma shall have a lien on all such property from the date that suit shall be instituted by the Attorney-General in any court of competent jurisdiction within this State for the purpose of forfeiting charter or cancelling the permit of such corporation, or for the recovery of such fines or penalties, the institution of such suit for the recovery of such fines, penalties or forfeitures shall constitute notice of such lien.

Section 13. Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence, or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this Act, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business.

Section 14. In all prosecutions or proceedings under

this Act, it shall be sufficient to prove that a trust, monopoly, combination in restraint of trade or commerce existed without the period not barred by the statute of limitations, and was continued in any form into and during any portion of the period not so barred, and that the defendant belonged to it, or acted for or in connection with it without proving all the members belonging to it, or proving or producing any article or agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

Section 15. Any violation of this Act, committed before its passage, and continued in any illegal form after its passage, is within its terms.

Section 16. The remedies provided by this Act are applicable to all pending actions.

Section 17. Nothing in this Act shall abridge or alter any remedy or remedies now or hereafter existing, either at common law or by statute, but the provisions of this Act are in addition to such remedies.

Section 18. An emergency is hereby declared to exist for the passage of this Act, for the preservation of the public safety of this State, and this Act shall be in force and effect from and after its passage and approval.

Approved June 10, 1908.

Chapter 90, Compiled Oklahoma Statutes 1921.
Sections 11017-11035.

TRUSTS AND POOLS.

CHAPTER 90.

Article I. Combinations in Restraint of Trade — In General.

ARTICLE I.

Combinations in Restraint of Trade—In General.

11017. Trust Declared Illegal. Every act, agreement, contract or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal.

11018. Duty of Attorney-General. If the Attorney General shall have sufficient evidence that the provisions of the Constitution or any law pursuant thereto, against the establishment or maintenance of any trust, monopoly or unreasonable restraint of trade, or any of the provisions of this article, are about to be or have been violated by any person, firm, corporation or association engaged in any quasi-public business or having a virtual monopoly of any commodity or business, with the intention or effect of destroying competition or restraining trade, contrary to the provisions of this article, he may file information in the Supreme Court, and by proceeding as against nuisance, enjoin and restrain said combination or arrangement, or any of its members, or by a proceeding analogous to libel, cause any or all the personal property of said offending person, firm or corporation or association, used or to be used, in whole or in part, in any transaction which, in effect or intent, hinders competition, or produces unreasonable restriction of trade, to be forfeited to the State, in the discretion of the court, together with all the commodities in the possession or control of such offending corporation, person, firm or association, used or intended for such use in violation of the Constitution or laws pursuant thereto, or this article; and he may take both said proceedings.

11019. Same—Restraining Order—Receiver. Upon the filing of such petition, or at any time thereafter, the Attorney-General may apply for an injunction pending the action, and the appointment of a receiver for any or all of the property of such person, firm, corporation or association. Upon such application, the court, or a majority of the justices thereof, if in vacation, is authorized to issue a restraining order pending the action, enjoining the defendant from changing in any way the business, records, books,

instruments or property to them belonging, or by them used, directly or indirectly, and to issue a rule to show cause why a receiver should not be appointed, and after notice of such rule shall have been served on the defendant or defendants or any managing agent of said defendant or defendants within this State, and an opportunity to be heard having been given, said receiver may be appointed in the discretion of the court, to take charge of the property of the defendant or defendants so notified.

11020. Duty of Receiver — Evidence. Such receiver shall preserve said property free from any illegal arrangement until the termination of the litigation, and thereafter dispose of the same according to law; or any other remedy may be applied or both, more effectually to produce and consummate such preservation or forfeiture or both; and said court shall be authorized by appointed master in chancery, or otherwise, in its discretion, to receive evidence in any county in the State, according to the rules of civil procedure, and have findings of fact made thereon for said court; and said master in chancery shall have compulsory process for witnesses and the production of books and papers from any part of the State, and for this purpose the executive officers of the said court, or any of the district courts of this State, shall be empowered to serve mesne and final process; and the services of said master in chancery, or other person appointed by the court, shall be paid for as costs by the losing parties in said cause, in an amount equal to the fees that would have been earned therein if a notary public had received said testimony, together with a sum of not exceeding ten dollars per day, in the discretion of the court, and the actual expenses for each day that testimony is actually received; and testimony and evidence in such action may also be taken by deposition anywhere within or without this State, as in civil actions in the district court. In the event of a violation of any order of the court therein, and a proceeding grows out of the same in the nature of contempt, if the defendant demand a trial by jury, the court may transfer the said contempt proceedings to any district court of the State for trial by jury and a verdict;

but the judgment, if any, shall be rendered by said Supreme Court, and sentence, if proper, passed by it. This proceeding shall be in addition to, and cumulative as to any other provisions of the law applicable to the same situation.

11021. Stay Bond. The appointment of such receiver may be stayed, or, after appointment and possession taken, the receiver shall be discharged, upon the defendant giving bond in an amount and with sureties to be approved by said court or a justice thereof, conditioned for the payment of all damages and costs which may be assessed against the defendant in said proceeding in favor of the State, or any officer or person.

11022. Recourse of Injured Parties. Any person, firm, corporation or association, who shall be injured in his business or property by any other person, firm, corporation or association, by reason of anything forbidden, or declared to be unlawful by this article, may sue therefor in the courts of this State, and shall recover threefold the damages by him sustained, and the cost of suit, and a reasonable attorney's fee, to be fixed by the court.

11023. Foreign Corporations Forfeit License by Violation. Every foreign corporation, as well as every foreign association exercising any of the powers, franchises or functions of a corporation in this State, violating any of the provisions of this article, is hereby denied the right and prohibited from doing business in this State, and the Secretary of State, upon the order of the Corporation Commission, or any competent court, made after due notice and in due course of law, shall revoke the license of any such corporation or association heretofore authorized to do business in this State.

11024. Discrimination Unlawful. It shall be unlawful for any person, firm, corporation or association engaged in the production, manufacture, distribution or sale of any commodity of general use, or rendering any service to the public, to discriminate between different persons, firms, associations or corporations, or different sections, communi-

ties of cities of the State by selling such commodity, or rendering such service at a lower rate in one section, community or city than another, or at the same rate or price at a point away from that of production or manufacture as at the place of production or manufacture, after making due allowance for the difference, if any, in the grade, quantity or quality, and in the actual cost of transportation from the point of production or manufacture, if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition, or restriction of trade.

11025. Penalty and Recovery. Any person who shall violate any of the provisions of this article, or take part, or aid, or advise in any such violation, or who shall, as officer, manager, director, agent, servant or employe of any firm, corporation or association, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information, knowingly, to assist in carrying out such purposes, or in pursuance thereof, in violation of said provisions, shall be punished by a fine of not less than fifty dollars, nor more than ten thousand dollars, and by imprisonment not less than ten days nor more than ten years, at the discretion of the court; and each day's violation of any of the provisions of this article shall constitute a separate offense. And any sum which might be assessed as a fine by way of punishment for a crime, as herein provided, may be recovered by the State as a penalty in civil action in addition to, or irrespective of, the assessment and assessibility of said fine, either before, after, or simultaneously with the pendency of said criminal action.

11026. Indictment or Information Shall State What. In any indictment or information for any offense named in this article, it is sufficient to state the purpose or facts of the trust, monopoly or unlawful combination in restraint of trade or commerce, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purpose, without giving its name, or description, or stating how, when or where it was created.

11027. Witnesses. It shall be the duty of the court

before whom any proceeding under this article may be brought, upon the application of the Attorney-General, to cause to be issued by the clerk of said court subjoenas for such witnesses as may be named in the application, and cause the same to be served by the sheriff of the county where or whither such subpoena is issued; and such witnesses shall be compelled to appear before such court or judge, at the time and place se forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this article; and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. Any person so subpoenaed and examined, shall not be liable to criminal prosecution for any violation of this artice about which he may testify, neither shall the evidence of any such witness be used against him in any criminal proceeding. The evidence of all the witnesses shall, at the option of the Attorney-General, be taken down and shall be transcribed and placed in the hands of the Attorney-General, and he shall be authorized to prosecute such violator or violators of this article as the testimony so taken shall disclose. Witnesses subpoenaed as provided in this act (article) shall be compelled to attend from any county in the State.

11028. County Attorneys to Prosecute. It shall be the duty of the county attorneys of the several counties of this State, as well as the Attorney-General of the State, to prosecute all actions to enforce the criminal provisions of this article.

11029. Combinations in Restraint of Trade Unlawful. It shall be unlawful for any person, partnership, firm, association, corporation or joint stock company, or agent thereof, to issue, or to own, trust certificates, or for any person, firm, partnership, association, joint stock company or corporation, agent, officer, employe, or the director or stockholders of any corporation, association or joint stock company, to enter into any combination, contract or agreement with any person, corporation or association, firm or

partnership, or with any stockholder, director or officer, agent or employe of the same, the purpose or effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the conduct or operation of the same, or the output or manufactured product thereof, or the marketing of the same, in the hands of any trust or trustee, holding corporation or association, firm or committee, with the intent or effect to limit or fix the price, or lessen the production or sale of any product or article of commerce, or the use or consumption of the same, or to prevent, restrict, limit or diminish the manufacture or output of any such article of commerce, use or consumption; and every person, firm, partnership, association, joint stock company or corporation, or any agent, employe, officer or director of the same, that shall enter into any such combination, contract, management or agreement for the purpose aforesaid, shall be deemed and adjudged guilty of conspiracy in restraint of trade, and punished as provided for in Section 11025, insofar as applicable: Provided, that this section shall not be construed to extend beyond the scope and meaning of the first section of this article.

11033. Penalty for Corporation Owning Stock of Competitor. Every corporation which shall own, hold or control, in any manner whatever, the stock of any competitive corporation or corporations engaged in the same kind of business in or out of this State, in violation of the Constitution and laws of this State, shall forfeit its charter or license to do business in this State, and shall be subject to a penalty of not less than one thousand dollars, nor more than ten thousand dollars, to be recovered at the suit of the State in any court of competent jurisdiction.

11034. State to Have Lien on Property of Law-Breaking Corporation. Whenever any corporation created under the laws of this State, or any foreign corporation authorized to do business in this State, shall violate any law of this State, for the violation of which fines, penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which

may hereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties, and for all costs of suit, and of collection. The State of Oklahoma shall have a lien on all property from the date that suit shall be instituted by the Attorney-General in any court of competent jurisdiction within this State for the purpose of forfeiting the charter or cancelling the permit of such corporation, or for the recovery of such fines or penalties; the institution of such suit for the recovery of such fines, penalties or forfeitures shall constitute notice of such lien.

11032. Public Business Defined. Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business.

11033. Proof Required. In all prosecutions or proceedings under this article, it shall be sufficient to prove that a trust, monopoly, combination in restraint of trade or commerce existed without the period not barred by the statute of limitations, and was continued in any form into and during any portion of the period not so barred, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or prov-

ing or producing any article or agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

11034. Previous and Continuing Violations Included. Any violation of this article committed before its passage, and continued in any illegal form after its passage, is within its terms.

11035. Remedies Additional to Former Remedies. Nothing in this article shall abridge or alter any remedy now existing, either at common law or by statute, but the provisions of this article are in addition to such remedies.

Ice Permit of Appellant for 1930-1931.

No. 925.

Great Seal of the State of
Oklahoma 1907

State of Oklahoma Corporation Commission

Ice License.

Manufacture, Sale and Distribution.

Know All Men by These Presents: That New State Ice Company of Oklahoma City, a Company, having filed application for license to manufacture, distribute, and sell ice in the State of Oklahoma, at Oklahoma City, and having shown that it is entitled to license as prescribed by Chapter 147, Session Laws of 1925.

That said New State Ice Company is hereby authorized and licensed by the Corporation Commission to manufacture, distribute and sell ice in the State of Oklahoma at Oklahoma City, from July 1 1930, to June 30, 1931, inclusive.

In Witness Whereof, the Corporation Commission has caused this license to be signed by its Chairman and attested by its Secretary, and its Seal affixed thereto, this 30th day of June, 1930.

Corporation Commission,

C. C. Childers, Chairman.

Attest:

Ed. Hicks, Jr., Asst. Secretary.

(Seal of Corporation Commission of Oklahoma)

Ice Permit of Appellant for 1931-1932.

No. 1146.

Great Seal of the State of Oklahoma 1907

State of Oklahoma Corporation Commission

Ice License.

Manufacture, Sale and Distribution.

Know All Men by These Presents: That New State Ice Company of Oklahoma City, Oklahoma, a Company, having filed application for license to manufacture, distribute, and sell ice in the State of Oklahoma, at Oklahoma City, and having shown that it is entitled to license as prescribed by Chapter 147, Session Laws of 1925.

That said New State Ice Company is hereby authorized and licensed by the Corporation Commission to manufacture, distribute and sell ice in the State of Oklahoma at Oklahoma City, Oklahoma, from July 1, 1931, to June 30, 1932, inclusive.

In Witness Whereof, the Corporation Commission has caused this license to be signed by its Chairman and attested by its Secretary, and its Seal affixed thereto, this 10th day of July, 1931.

Corporation Commission,

Paul A. Walker, Chairman.

Attest:

Ed. Hicks, Jr., Asst. Secretary.

(Seal of Corporation Commission of Oklahoma)

FILE COPY

No. 48

In the Supreme Court of the United States

October Term, 1951

New Braun Ice Company,
a Corporation,
Appellant,

vs.

Ernest A. Lindsley,
Appellee.

BRIEF OF THE APPELLEE

[illegible]

INDEX

Page

Statement of the Case 1

Argument 7

The Act of the Legislature of the State of Oklahoma, approved April 7, 1925 (being Chapter 147, Session Laws of Oklahoma, 1925), is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States 7

Whether a business is public or private, or clothed with a public interest, is for the courts to determine 12

The use of ice and the volume of business not sufficient to clothe the business with public interest 15

Ice plant not public utility 16

Power to regulate, not to prohibit 21

Decisions of State courts 30

No appeal provided 35

The penalties imposed for the violation of the Act are so severe as to render the Act unconstitutional 40

AUTHORITIES

Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. R. 662 22

Algeyer et al. v. State of Louisiana, 165 U. S. 578, 17 Sup Ct. R. 427 27

Baker v. Capshaw, 130 Okla. 86, 65 Pac. 115 38

Burns Baking Co. et al. v. Bryan, 264 U. S. 504, 44 Sup Ct R. 412 23

Butchers' Union v. Crescent City, 111 U. S. 746, 4 S. C. R. 652 28

Cap F. Bourland Ice Co. v. Franklin Utilities Co. and Arkansas Railroad Commission v. Castetter et al., 22 S. W. (2d) 993 34

Chickasha Cotton Oil Co. v. Cotton County Gin Co., 40 Fed. (2d) 846 46

Choctaw Cotton Oil Co. v. Corporation Commission, 121 Okla. 51, 247 Pac. 390 30

Ex parte Tindall, 102 Okla. 192, 229 Pac. 125 39

Ex parte Young, 209 U. S. 123, 28 Sup. Ct. R. 441 40

Fairmont Creamery Co. v. State of Minnesota, 274 U. S. 1, 47 Sup. Ct. 506 17

Frost v. Corporation Commission, 278 U. S. 515, 49 Sup. Ct. Rep. 245 43

	Page
Grand Rapids & I. Ry. Co. v. Hunt, 78 N. E. 358	38
Hall v. Nebraska, 100 Neb. 84, L. R. A. 1916F 136	32
In re. Farmers Co-operative Gin Co., 122 Okla. 115, 251 Pac. 829	38
In the Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636	31
Lawton v. Steele, 152 U. S. 133, 14 S. C. R. 499	14
Louis K. Liggett Co. v. Baldridge et al., 278 U. S. 105, 49 Sup. Ct. R. 57	26
Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340, 33 Sup. Ct. 961	41
Muskogee County et al. v. Muskogee Gas & Electric Co., 83 Okla. 167	36
Mott on Due Process of Law, page 533	16
Myers v. State of Nebraska, 262 U. S. 390, 43 Sup. Ct. R. 625	24
Oklahoma Gin Co. v. State of Oklahoma, 255 U. S. 339, Sup. Ct Rep. 341	37
Oklahoma Gin Co. v. State, 63 Okla. 10, 158 Pac. 629	8
Oklahoma Light & Power Co. v. Corporation Commission et al., 96 Okla. 19, 220 Pac. 54	11
Oklahoma Operating Co. v. Love et al., 252 U. S. 331, 40 Sup. Ct. R. 338	37
Pioneer Telephone & Telegraph Co. v. State, 40 Okla. 417, 138 Pac. 1033	38
Ribnik v. McBride, 277 U. S. 350, 48 Sup. C. R. 545	18
Section 11017 of Chapter 90	8
Section 11032 of Chapter 90	7
State ex rel. v. Smith, 84 Pac. 851	32
State v. Santee, 111 Iowa 1, 82 N. W. 445, A. S. R. 489	31
State ex rel. Short, Attorney General, v. Riedell et al., 109 Okla. 35	45
Smith v. Texas, 233 U. S. 630, 34 Sup. Ct. R. 681	25
Union Ice & Coal Co. v. Ruston, 135 La. 898, 66 So. 262	50
Wadley Southern Railway Co. v. State of Georgia, 235 U. S. 651, 35 Sup. Ct. Rep. 214	42
Weaver v. Palmer Bros. Co., 270 U. S. 402, 46 Sup. Ct. R. 320	23
Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. R. 115	19
Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 522, 43 Sup. Ct. R. 630	12

NO. 463

In the Supreme Court of the United States

OCTOBER TERM, 1931

NEW STATE ICE COMPANY,
a Corporation,
Appellant,

vs.

ERNEST A. LIEBMANN,
Appellee.

BRIEF OF THE APPELLEE

STATEMENT OF THE CASE

The appellant's statement of the case is substantially correct so far as it goes but counsel have omitted certain facts brought out by the evidence on behalf of the appellee which we deem material to a complete understanding of this case.

Appellant mentions only the evidence of the appellee himself and fails to include in the statement the evidence of certain witnesses, a summary of which evidence is found on pages 22, 23 and 24 of the record and we desire to supplement the appellant's statement by calling the court's attention to the evidence of O. W. Bartell (p. 22) who testified that he was engaged in the dairy business in Okla-

homa county; that he bought ice prior to 1925 at 25 cents per hundred; that ice was delivered at his door at the present time for 40 cents a hundred; that he knew nothing of any agreement prior to June, 1925 as to prices among ice manufacturers; that formerly he bought ice where he could buy it cheapest and that there were probably three plants soliciting his business in 1925; that he did not know that the Corporation Commission was regulating the price of ice in Oklahoma City prior to 1925.

The evidence of T. F. Hurt (p. 22) who testified that he lived in Oklahoma City and was in business therein; that he has been a dairyman for about twenty years; that prior to June, 1925 he paid $4.00 per ton for ice at the docks from the New State, the Crystal and the Big Four plants; that at present he made his own ice; that he started making his own ice because ice was raised from $4.00 to $7.00 a ton after this law went into effect.

The evidence of R. D. Davis (p. 23) shows that he resided in Bethany, Oklahoma; that he had been in the ice business in 1924 and 1925; that he did not manufacture ice but bought ice from Mr. Liebmann and the New State Ice Company in Oklahoma City prior to the passage of the act of 1925 for 30 cents a hundred at the docks; that the next spring ice in Bethany sold for 60 cents a hundred delivered and 50 cents a hundred at the docks.

John Brasier testified (p. 23) that from 1910 to 1928

he was engaged in the ice business, buying wholesale and selling retail to his customers; that prior to June, 1925, he paid 25 cents a hundred at the manufacturers' docks and bought from the Big Four, Crystal Ice and Ice Cream Company and New State; that after June, 1925, he paid 35 cents a hundred.

The evidence of S. B. Farnham (p. 23) who testified that he had been in the ice business for 15 years in Iowa; that from his experience ice could be shipped from 50 to 75 miles in a good tight refrigerator car; that he was not acquainted with conditions in Oklahoma City but could not see any material difference between manufacturing and selling ice and the preparation and sale of meat or the baking and selling of bread; that nothing was used in the manufacturing of ice that was injurious to the public health; knew nothing about the business that was injurious to the public welfare or morals; did not require expert skill to operate an ice plant; a man of average intelligence could learn to operate a plant.

George Winchell (p. 24) testified that he was employed by the Sherman Machine and Iron Works as refrigerating engineer; that his employers were agents for ice-making or refrigerating machines; that the process of manufacturing ice was chilling water to the freezing point and some system of agitation, in the case of raw water, to make it freeze clear; that there was nothing in the machinery or any

ingredient placed in the water that was injurious to the public health; that there was a slight decrease in the price of ice manufacturing machinery since June, 1925, but the machines had been simplified; that many big establishments manufactured their own ice; that he could see but little difference between the sale and delivery of ice and other manufactured products—for instance, meat might spoil; ice just melts.

From the pleadings and evidence it will be observed that appellant is manufacturing and selling ice in Oklahoma City; that it held a permit, or license, granted by the Corporation Commission of the State of Oklahoma, under the provisions of Chapter 147, Session Laws of Oklahoma, 1925, which appellant claims constitutes a franchise. The appellee has erected an ice plant, under a building permit issued by the city, and is manufacturing and selling ice without having first secured a permit so to do from the Corporation Commission.

The appellant alleges that the manufacture and sale of ice is a public business, as defined by Section 11032, Compiled Statutes of Oklahoma, 1921, and a public utility, and if defendant is permitted to engage in the ice business without a permit or license so to do, it will be deprived of its property without due process of law.

Appellee denies that said permit constitutes a franchise, and denies that appellant will be deprived of its

property rights by him engaging in business without a permit. He alleges that the manufacture and sale of ice is a private business, not clothed with a public interest, and does not render a public service; does not exercise the right, and has not the power, of eminent domain; does not require the use of the streets nd highways in any manner not used by the public at large; is not injurious to the public health, safety or morals. That it is a useful and necessary occupation, and that unless he is permitted to engage in the ice business and to use his property for that purpose, he will be deprived of his property rights in violation of the Constitution of the United States, and the Constitution of the State of Oklahoma, and he alleges that the Act of the Legislature of the State of Oklahoma, known as the Ice Act, being Chapter 147, Session Laws of 1925, is in violation of the rights guaranteed to him under Section 10 of Article 1, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The evidence discloses that the appellee has been engaged in the business of manufacturing and selling ice since 1903; that he has erected a small ice plant of between 25 and 30 tons daily capacity under a building permit granted him by the City; that the cost of said plant is approximately $40,000.00; that said plant is what is known as a one-man plant; that is, one man operates it.

The evidence further discloses that it does not require

any unusual skill to operate a modern raw water ice plant; that ice can be manufactured cheaper than it could in and prior to 1925; that the equipment is simpler to operate, more ice can be handled with an electric hoist than before; that the ice business is merely manufacturing and selling a product; that said business does not differ in its general conduct from that of the butcher, grocer or baker; that there is no material difference between the manufacturing and selling of ice and the preparation and sale of meat, or the baking and selling of bread; that there is nothing about the business that is injurious to the public health, welfare or morals; that from 30% to 40% of the ice manufactured was sold at the plant, the customers coming for it; that in the conduct of the business no different use of the streets was required than that of the public at large; that there is no material difference between a commercial ice plant and a home refrigerating plant, the principle is the same, and both are simple in their construction and operation; that there are a great many individual ice plants in Oklahoma; that many hotels, restaurants, meat markets and hospitals and dairymen have their own plants.

It is further disclosed that prior to 1925 there was no monopoly in the ice business; that there was no agreement between the manufacturers as to the price of ice; that at the time the act under consideration was passed there were eight plants in Oklahoma City owned by six companies; that

there are now eleven plants owned by three companies; that the price of ice is higher than it was prior to the passage of the Act.

ARGUMENT.

The Act of the Legislature of the State of Oklahoma, approved April 7, 1925 (being Chapter 147 Session Laws of Oklahoma, 1925) is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The Act referred to is set out at length in the brief of Appellant, and will not be repeated here.

Section 1 of this Act declared the ice business to be a public business, as defined by Section 11032 of the Oklahoma Statute, which reads as follows:

> "Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such manner as to make it of public consequence or to affect the community at large as to the supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by this state, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon

reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

This section of the statute was construed by the Supreme Court of the State in *Oklahoma Gin Company v. State*, 63 Okla. 10, 158 Pac. 629, as applying only to those businesses which were conducted in violation of Section 11017 of the Compiled Statutes, which reads:

"Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against public policy, is hereby declared to be illegal."

In that case the Supreme Court of the State said:

"When the Legislature by Section 1 of the Act denounced every act, agreement, contract, or combination, in whatsoever form and every conspiracy in restraint of trade within the State as illegal, and in Section 13, 11082, provided, among other things, that:

"'Whenever any business (within the State) * * * is such that the public must use the same, or its services, * * * or (whenever) the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or (in such manner as) to effect the community at large as to supply, demand or price or rate thereof, or (and) said business is conducted in violation of the first section of this Act, said business is a public business, and (is) subject to be controlled, * * * by the Corporation Commission,' it meant that whenever a business, although organized, it may be, for the purpose of private gain, has placed its property in such a position that the public has become interested in its use and such business is conducted in violation of Section 1 of

the Act, *i. e.*, governed by a trust, monopoly, or combination or conspiracy in restraint of trade, the same was, by the Act, declared to be a public business, and made subject to the control of the Corporation Commission. Speaking to said section, in *Shawnee Gas & Elect. Co.* v. *Corporation Commission*, 35 Okla. 434, 130 Pac. 127, quoting approvingly from an unpublished opinion of Hayes, J., we said:

" 'This section provides that whenever a business shall have certain characteristics, it shall be a public business, and shall be subject to the jurisdiction of the Corporation Commission to regulate its practices, rates, and prices; but it does not provide that all public business shall be subject in these respects to such jurisdiction. * * * The first part of said section attempts to define the class of business which the latter part of the section subjects to the jurisdiction of the Corporation Commission and the district courts. It appears to us clear that what was intended was to bring within the jurisdiction of the Commission the regulation of charges and rates for services connected with those businesses that violate the Acts and are connected, not with business strictly of a public character, such as common carriage, supply of water and gas, but with that class of business in which the owners, without any intent of public service, have placed their property in such a position that the public has an interest in its use. The distinction between the class of business and its service intended to be defined by and included in said section and the business and service of public corporations, is, we think, well made by Mr. Justice Brewer, who delivered the opinion of the court in *Cotting* v. *Goddard*, 183 U. S. 72, 22 Sup. Ct. 30, 46 L. ed. 92, in the following language: 'In the one (referring to property devoted to public service) the owner has intentionally devoted his property to the discharge of a public service. In the other, he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in

its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself; in the other, that he submits to only those necessary interferences and regulations which the public interest requires.'' It was this second class of business with which we think Section 13, was dealing and intended to place under the jurisdiction of the Corporation Commission and the district courts of the State as to all practices, rates and charges. * * * The Act confers, not only upon the Corporation Commission jurisdiction to prescribe rates and charges under the conditions therein named, but confers also a like and concurrent power upon the district courts of the State.' ''

Sections 11017 and 11032 of the statute are a part of the anti-trust act, and unless the manufacture and sale of ice falls within the provisions of this Act, Chapter 147, S. L. 1925, the Ice Act, is without effect. This Act does not declare ice plants to be public utilities, nor does it declare the manufacture and sale of ice to be a public business, except as defined by Section 11032.

This section authorized the Corporation Commission, or any district court of the State, to regulate any business that is violating the provisions of 11017. A business may violate that section whenever, by reason of its nature, there is a monopoly, if it is such that the public must use the same, or its commodities bought or sold in such a manner

as to make it of public consequence. This is the holding of the court in *Oklahoma Light & Power Co. v. Corporation Commission, et al*, 96 Okla. 19, 220 Pac. 54, where it is said:

> "Whether or not the manufacture, sale, and distribution of ice within any city or community is conducted in such a way and to such an extent as to bring it within the statutory characteristics and subject it to regulation by the Corporation Commission is dependent upon the established facts in a proper hearing before the Commission for the regulation of such business, and if upon such hearing the evidence shall disclose such a state of facts as would bring such business within the statute, the Commission would have jurisdiction to regulate the rates in the distribution of ice."

We respectfully submit that the proof in this case shows that prior to the passage of the Ice Act, there was no monopoly in the ice business. Nor was the public compelled to use the ice sold by any particular ice plant, or manufacturer. Nor was ice bought and sold in such a manner as to make it of public consequence. True, the secretary of the ice association testified he had numerous complaints from patrons of ice companies. Some complaining of the quality of the ice, some of the price, and others of the manner and time of delivery. There was also some proof to the effect that in a few instances where two ice plants were operating in one town, one of the plants became bankrupt and the other purchased it at a small price. This falls far short of proof that the manufacturing and selling of ice in Oklahoma City is a public business as defined in Sections 11017 and 11032 of the statute.

Whether a business is public or private, or clothed with a public interest, is for the courts to determine.

The legislative declaration that a business is affected with a public interest, is not conclusive of the question whether attempted prohibition and regulation on that ground is justified, but the question is always one of judicial inquiry. *Wolff Packing Company* v. *Court of Industrial Relations of Kansas,* 262 U. S. 522, 43 Sup. Ct. R. 630, and *Tyson and Brother* v. *Banton,* 273 U. S. 418, 47 Sup. Ct. R. 426.

In the Wolff Packing Company case Chief Justice Taft, in delivering the opinion, said:

"Business said to be clothed with a public interest justifying some public regulations may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers, and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislature for regulating all trades and callings. Such are these of the keepers of inns, cabs and gristmills. *State* v. *Edwards,* 86 Me. 102, 29 Atl. 947, 25 L. R. A. 504, 41 Am. St. Rep. 528; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, 254, 3 Sup. Ct. 583, 60 L. ed. 984, Ann. Cas. 1916D 765.

"(3) Businesses, which, though not public at their

inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use, it subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 4 Sup. Ct. 48; 28 L. ed. 173; *Budd* v. *New York*, 117 N. E. 1, 27, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *Id.*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247; *Brass* v. *Stoeser*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A 487; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011, L. R. A. 1915C 1189; *Van Dyke* v. *Geary*, 244 U. S. 39, 47, 37 Sup. Ct. 458, 65 L. ed. 865, 16 A. L. R. 165.

"It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'Clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a com-

modity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raised implications of an affirmative obligation on their part to be reasonable in dealing with the public."

And the court further says:

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, of the baker, the tailor, the wood-chopper, the mining operator, or the miner, was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true, that in the days of the early common law an omnipotent parliament did regulate prices and wages as it choose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

"An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes. *United States* v. *Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007; *Terminal Cab Co.* v. *Kutz*, 241 U. S. 252, 256, 36 Sup. Ct. 583, 60 L. ed. 984, Ann. Cas. 1916D 765, and while this feature does not necessarily exclude businesses from the class clothed with a public interest, *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011, L. R. A. 1915C 1189, it usually distinguishes private from quasi-public occupations."

In the case of *Lawton* v. *Steele*, 152 U. S. 133, 14 S. C. R. 499, this Court said:

"The legislature may not, under the guise of pro-

tecting the public interest, arbitrarily interfere with private business, or impose unusual or unnecessary regulations upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. In *Jusnetzky* v. *Security Ins. Co.* (Mo.), 281 S. W. 47, A. L. R. 189, it was held that it is not within the power of the legislature to forbid a man to transact any business otherwise perfectly lawful. Such a right was held to be guaranteed by a provision that 'all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry.' "

The use of ice and the volume of business not sufficient to clothe the business with public interest.

Considerable proof was offered as to the extensive use of ice in the preservation of foods, and the shipment of meats and vegetables, also as to the increased output and sale of ice in the State of Oklahoma during the last several years. That ice is generally used in the preservation and preparation of various foods and drinks, including milk for the babies, as testified by the learned chemist, must be admitted by the appellee. But this does not prove the ice business to be a monopoly, or a commodity that must be purchased by the public, or a public utility, nor authorize the legislature to prohibit the defendant from engaging in the business without a permit from the Corporation Commission.

There was also proof, by the secretary of the Ice Men's

Association, to the effect that since the passage of the Ice Act, the members had greatly improved their service to the public and were manufacturing a better quality of ice, with improved machinery. All of which could have and should have been done prior to the passage of the Act.

Ice plant not public utility.

There is no statute of this State declaring ice plants public utilities. In *Mott on Due Process of Law*, page 533, it is said:

> "The difficulty inherent in this view is clearly shown in the cases involving the validity of municipal ice plants. In certain localities, there can be no question that ice is a necessity. Without adequate refrigeration, life would be intolerable, and it is ever conceivable that the public health would be endangered. Upon this basis the Supreme Court of Georgia upheld an act permitting municipalities to build their own ice plants. But the real question in the case seems to be whether private enterprise can and has furnished ice in sufficient quantities to protect the public necessity. In other words, is an ice plant a public utility? That it is not, is obvious, and for this reason municipal ice plants have been held unconstitutional in Louisiana and Missouri."

The ice man is not compelled by any Act of the legislature to sell his product. He is not furnishing a service. He is not guaranteed any return on his investment. A public utility is required to serve the public, and its rates fixed so as to guarantee a reasonable return on the invest-

ment, including operating expenses. The ice manufacturer may sell or not sell as he sees fit. It is in proof that an increasing number of individuals and corporations are manufacturing ice for their own use.

We may admit, for argument's sake, that ice is a family necessity. So is meat, bread, sugar, coffee, tea, and potatoes.

The fact that competition might result in the bankruptcy of one plant and thereby permit the other to increase the rates, is no argument in favor of the constitutionality of the Ice Act, conceding the importance of ice in the home and as generally used. Much the same argument was made to sustain the Act in question in *Fairmont Creamery Co.* v. *State of Minnesota*, 274 U. S. 1, 47 Sup. Ct. Rep. 506. In that case the Act of the legislature controlled the purchase and sale of cream. It was argued that unless the price of cream was controlled, the powerful buyers would destroy competition. The Act was held unconstitutional. In that case this court said:

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> "As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts, long regarded, not only as essential to the freedom of

trade and commerce, but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequence. Enforcements of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish for all points, without regard to ordinary trade conditions.

"The real question comes to this: May the State, in order to prevent some strong buyer of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights, whose exercise does not ordinarily produce evil consequences, but the reverse."

In the case of *Ribnik* v. *McBride*, 277 U. S. 350, 48 Sup. C. R. 545, this court held the statutes of New Jersey, empowering the State Commission of Labor to fix prices which an employment agent should charge for his services, violative of the due process of law clause of the Fourteenth Amendment, as such business was not affected with a public interest. In the opinion it was said:

"An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer and the apartment or tenement house owner, and the broker who acts as intermediary between such owner and his

tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control. *Wolff Co.* v. *Industrial Court, supra,* page 536 (43 S. Ct. 630). Under the decisions of this court it is no longer fairly open to question that, at least in the absence of a grave emergency (*Tyson & Brothers* v. *Banton, supra,* pages 431, 437, 47 S. Ct. 426), the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place."

The volume and extent of the business does not determine its character. In the case of *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 49 Sup. Ct. R. 115, this Court declared invalid an Act of the Legislature of Tennessee providing for fixing the price of gasoline. It was there held that such business is not affected with the public interest. In that case it was said:

"It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is 'affected with a public interest.'

Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522, 43 S. Ct. 630, 67 L. ed. 1103, 27 A. L. R. 1280; *Tyson & Brother* v. *Banton, supra*; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 47 S. Ct. 506, 71 L. ed. 893, 55 A. L. R. 163; *Ribnik* v. *McBride*, 277 U. S. 350, 48 S. Ct. 545, 72 L. ed. 913. Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this Court, beginning with *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. *Tyson & Brother* v. *Banton, supra*, 273 U. S. 434 (47 S. Ct. 426). Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. *Id.*, 273 U. S. 430 (47 S. Ct. 426). The meaning and application of the phrase are examined at length in the Tyson case, and we see no reason for restating what is there said.

"In support of the Act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the character of the business, not with its size or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by

merchants and private dealers in the country. The decisions referred to above make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.' Those decisions control the present case.

"There is nothing in the point that the Act in question may be justified on the ground that the sale of gasoline in Tennessee is monopolized by appellees, or by either of them, because, objections to the materiality of the contention aside, an inspection of the pleadings and of the affidavits submitted to the lower court discloses an utter failure to show the existence of such monopoly."

In the business of manufacturing and selling ice can be said to be subject to government regulation at all, it falls within the third class mentioned in the Wolff Packing Company case, "Businesses which, though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulations."

Power to regulate, not to prohibit.

The power to regulate prices does not, necessarily, carry with it the power to prohibit from engaging in the business. Prior to the Ice Act the Corporation Commission was regulating the ice business, under Sections 11017 and 11032 of the statute, but was not granting or refusing permits to engage in the business. The Commission was regulating only where it was made to appear that a

monopoly existed or an unfair price was being charged to the buying public. The State may or may not have the power to regulate the price to be charged. That question is not presented here. Complainants seek here to prevent the defendant from entering the business in competition with them.

The right to prohibit was involved in the case of *Adams* v. *Tanner*, 244 U. S. 590, 37 Sup. Ct. R. 662, where an Act of the Legislature of the State of Washington was called in question. The Court, in holding the Act unconstitutional, said:

> "Prohibition, not regulation, is what is accomplished by the provisions of the Washington Employment Agency Law (Wash. Laws 1915, Chap. 1), making it criminal to collect fees from workers for furnishing them with employment or information leading to such employment, although fees may still be collected from those seeking workers.
>
> "The right of the individual under U. S. Const., 14th Amend., to engage in a useful and lawful business is unwarrantably infringed by the provisions of the Washington Employment Agency Law (Wash. Laws 1915, Chap. 1), enacted in the purported exercise of the police power, which make it criminal to demand or receive, either directly or indirectly, from any person seeking employment, or from any person on his or her behalf, any remuneration or fee for furnishing such person with employment or with information leading thereto."

In commenting on the question the Court said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for

hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

In *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 46 Sup. Ct. Rep. 320, the Court said:

"The constitutional guaranties may not be made to yield to mere convenience. *Schlesinger* v. *Wisconsin*, 46 S. Ct. 260, 270 U. S. 230, 70 L. ed. 557. The business here involved is legitimate and useful, and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment. *Adams* v. *Tanner*, 37 S. Ct. 662, 244 U. S. 590, 596, 61 L. ed. 1336, L. R. A. 1917F 1163, Ann. Cas. 1917D 973; *Meyer* v. *Nebraska*, 43 S. Ct. 625, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1446; *Burns Baking Co.* v. *Bryan*, 44 S. Ct. 412, 264 U. S. 68, L. ed. 813, 32 A. L. R. 661."

In *Burns Baking Company et al.* v. *Bryan*, 264 U. S. 504, 44 Sup. Ct. Rep. 412, the court had under consideration an Act of the Legislature of Nebraska prohibiting the sale of loaves of bread other than of a given weight, and it was there held:

"A state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions on them.

"Where a constitutional protection is invoked, it is the court's duty to determine whether the challenged provision has reasonable relation to the evil sought to be prevented, and really tends to accomplish the purpose for which it was enacted."

In *Myers* v. *State of Nebraska,* 262 U. S. 390, 43 Sup. C. R. 625, the court in discussing the rights guaranteed by the Fourteenth Amendment, said:

"The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment:

"'No State * * * shall deprive any person of life, liberty or property without due process of law.'

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restrain, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognizant at common law as essential to the orderly pursuit of happiness by free men. *Slaughterhouse Cases,* 16 Wall. 36, 21 L. ed. 394; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 4 Sup. Ct. 652, 28 L. ed. 585; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 Sup. C. R. 1064, 30 L. ed. 220; *Minnesota* v. *Barber,* 136 U. S. 313, 10 Sup. Ct. 862, 34 L. ed. 455; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 17 Sup. Ct.

427, 41 L. ed. 832; *Lochner* v. *New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 937, 3 Ann. Cas. 1133; *Twining* v. *New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97; *Chicago, B. & Q. R. R.* v. *McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. ed. 328; *Traux* v. *Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. ed. 131, L. R. A. 1916D 545, Ann. Cas. 1917B 283; *Adams* v. *Tanner*, 224 U. S. 590, 37 Sup. Ct. 662, 51 L. ed. 1336, L. R. A. 1917F 1163, Ann. Cas. 1917D 973; *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357, 38 Sup. Ct. 337, 62 L. ed. 772, Ann. Cas. 1918E 593; *Traux* v. *Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. ed. 254; *Adkins* v. *Children's Hospital* (April 9, 1923), 261 U. S. 525, 43 Sup. Ct. 394, 67 L. ed. —; *Wyeth* v. *Cambridge Board of Health*, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439, 23 L. R. A. (N. S.) 147. The established doctrine is that the liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton* v. *Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385."

In *Smith* v. *Texas*, 233 U. S. 630, 34 Sup. Ct. Rep. 681, a statute of Texas making it a misdemeanor for any person to act as a conductor on a freight train in that state without having previously served for two years as a conductor or brakeman on such trains was declared unconstitutional. Although this involved the employee of a common carrier conceded to be a quasi-public business, the court said:

"Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those sepa-

rate and independent rights may lessen or extinguish the value of the other three. Insofar as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

"If the service is public, the State may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. *Re Lookwood,* 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; *Hawker* v. *New York,* 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Watson* v. *Maryland,* 218 U. S. 173, 54 L. ed. 897, 30 Sup. Ct. Rep. 644. The private employer may likewise fix standards and tests, but, if his business is one in which the public health or safety is concerned, the State may legislate so as to exclude from work in such private calling those whose incompetence might cause injury to the public. But, as the public interest is the basis of such legislation, the tests and prohibition should be enacted with reference to that object, and so as not unduly to 'interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' *Lawton* v. *Steele,* 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499."

Louis K. Liggett Co. v. *Baldridge et al.,* 278 U. S. 105, 49 Sup. Ct. Rep. 57, involved the validity of a statute of Pennsylvania requiring every pharmacy to be owned by licensed pharmacists, and in case of corporations, associations, and co-partnerships, requiring all partners or members to be licensed pharmacists, except as to those already

engaged in such business. The court held said statute violative of the Fourteenth Amendment, and stated:

> "A State cannot, 'Under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513, 44 S. C. 412, 413 (68 L. ed. 813, 32 A. L. R. 661). See, also *Meyer* v. *Nebraska*, 262 U. S. 390, 400, 43 Sup. Ct. 625, 67 L. ed. 1042, 29 A. L. R. 1446; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70, 74, 44 Sup. Ct. 439, 68 L. ed. 904; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534, 535, 455 Sup. Ct. 571, 69 L. ed. 1070, 39 A. L. R. 468; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 412-415, 46 Sup. Ct. 320, 70 L. ed. 654; *Fairmont Co.* v. *Minnesota*, 274 U. S. 1, 9-11, 47 Sup. Ct. 506, 71 L. ed. 893, A. L. R. 163."

Algeyer et al. v. *State of Louisiana*, 165 U. S. 578, 17 Sup. Ct. R. 427, involved a statute of the State of Louisiana entitled "An Act to prevent persons, corporations or firms from dealing with marine insurance companies that have not complied with law," and the court in holding the statute unconstitutional, said:

> "'Liberty,' as used in the provision of the Fourteenth Amendment to the Federal Constitution, forbidding the States to deprive any person of life, liberty, or property without due process of law, includes, it seems, not merely the right of a person to be free from physical restraint, but to be free in the enjoyment of all of his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to carry out the purposes above mentioned.

"A State statute which, as construed by the highest State court, prohibits a citizen of the State, under an open policy of marine insurance, effected outside the State, in a foreign insurance company which has not complied with the State laws, from sending by mail or telegraph, while in the State, a notice describing particular goods then within the State, upon which he desires the insurance under the open policy to attach (Act La. 1894, No. 66), operates to deprive such citizen of his liberty without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution. 18 South. 904, reversed."

In the case of *Butchers' Union* v. *Crescent City*, 111 U. S. 746, 4 S. C. R. 652, the court said:

"The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the Constitution. It is what no Legislature has the right to do; and no contract to that end can be binding on subsequent legislatures."

Justice Field said in a concurring opinion:

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to

pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.

"It cannot be that a State may limit to a specified number of its people the right to practice law, the right to practice medicine, the right to preach the gospel, the right to till the soil, or to pursue particular business or trades, and thus parcel out to different parties the various vocations and callings of life. The first Section of the Fourteenth Amendment was, among other things, designed to prevent all discriminating legislation for the benefit of some of the disparagement of others; and when rightly enforced as other prohibitions upon the State, not by legislation of a pemal nature, but through the courts, no one will complain."

Appellant admits that the permit under which it is operating is not exclusive. The Corporation Commission might issue a permit to the defendant and the issuance of such permit would not cancel the permit under which appellant operates. It alleges it will be deprived of its property rights if defendant operates without a permit. If his operation in competition with appellant would deprive it of its property, this damage would result with a permit as well as without. Since the State does not guarantee to appellant a reasonable return on its investment, it cannot be heard to complain of competition. If the effect of the Act is to destroy and prevent competition, it violates the provisions of the Constitution for that reason.

Appellant has no property right in the right to sell ice

without competition. It was so held by the Supreme Court of Oklahoma in the case of *Choctaw Cotton Oil Company* v. *Corporation Commission*, 121 Okla. 51, 247 Pac. 390. Under the provision of the statute in question there the Corporation Commission must find a necessity for a gin before granting a permit. But the statute also has provisions to the effect that where one hundred taxpayers petition therefor, the Corporation Commission must grant the license and it was of this provision the established gin complained. It was argued there that the grant of a permit, without a showing of necessity, would deprive the established gin of its property rights. In discussing the question it was said:

> "What property rights are taken from petitioners by licensing another gin under the foregoing proviso? What rights of any kind could the licensing of another gin effect? It does not disturb the property of petitioners, nor prevent the free operation of their gins. The only right which could be affected by such license is the right of petitioners to operate their gin without competition, a right which is not secured to them either by the State or Federal Constitution, hence the contention as to taking their property without due process of law cannot be sustained."

Decisions of State Courts.

Many State courts have passed upon kindred questions, holding statutes invalid as violative of the Fourteenth Amendment or of the provision of the State Constitutions that no person shall be deprived of life, liberty or property without due process of law; among these decisions are:

State v. *Santee,* 111 Iowa 1, 82 N. W. 445, A. S. R. 489, wherein the Court declared unconstitutional a statute providing for the use of gas manufactured from petroleum and further requiring a person to use a particular lamp, when others equally safe were in the market, and among other things said:

> "Exclusive privileges and franchises may, no doubt, be granted, when absolutely necessary to insure safety to the people, but not otherwise; see *Slaughter House Cases,* 16 Wall. 36. In this case the parties agree, however, that there are other lamps, operated on the same general principle as the Welsbach, that are equally safe, and that secure the same results. This being true, the Legislature has no power to select one and reject the other. To do so would be to create the most odious of monopolies. The statute under consideration was enacted in virtue of the police power of the State, but the Legislature cannot under this guise, create a monopoly; *Yick Wo.* v. *Hopkins,* 118 U. S. 356, 6 S. Ct. 1064; *State* v. *Cincinnati, etc., Coke Co.,* 18 Ohio State, 262; *Mayor, etc.,* v. *Thorne,* 7 Paige 261; *Norwich Gaslight Co.* v. *Norwich City Gas Co.,* 25 Conn. 19. The business of manufacturing lamps, or the use of gas or vapor for illuminating purposes, is not unusual, and does not demand primarily on governmental permission."

In The Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636, a statute was declared unconstitutional which made it a misdemeanor to manufacture cigars in cities of more than 500,000 inhabitants in any tenement house occupied by more than three families, except on the first floor of houses in which there is a store for the sale of cigars and tobacco. The court, among other things, said:

"Under the guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an Act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty then it is for the courts to scrutinize the Act and see whether it really relates to and is convenient and appropriate to promote the public health."

In *Hall* v. *Nebraska*, 100 Nebr. 84, L. R. A. 1916F 136, a statute prohibiting the sale of hog cholera serum was declared unconstitutional on the ground that any person has the right to adopt and follow any lawful industrial pursuit which is not injurious to the community. The court treated the monopoly feature of the law, saying:

"The Act creates a combination in restraint of trade. It permits the manufacturers of serum to monopolize the entire business of selling it in the State. It also makes it unlawful for any other person than the makers of serum to sell and vend it.

"If this law is permitted to stand, it means that the serum plants in Nebraska that have received a United States government veterinary license have a monopoly of the right to sell hog cholera serum. The law not only seeks to give these serum plants a monopoly on the right to sell serum, but it attempts to fix the price by requiring the manufacturers to mark on the outside of the bottle the price at which it is sold, and then provides further that it is a misdemeanor for anyone to give or accept a rebate or commission on the serum sold. It creates a monopoly of the right to sell, and then makes it unlawful for them to change the price."

In *State ex rel.* v. *Smith*, 84 Pac. 851, the Supreme

Court of Washington held an Act providing for the licensing of plumbers in violation of the Fourteenth Amendment as affecting the privileges and immunities of citizens, and after reviewing the decisions at length the court concludes its opinion in these words:

> "We cannot close our eyes to the fact that legislation of this kind is on the increase. Like begets like, and every legislative session brings forth some new Act in the interest of some new trade or occupation. The doctor, the lawyer, the druggist, the dentists, the barber, the horseshoer, and the plumber have already received favorable consideration at the hands of our Legislature, and the end is not yet, for the nurse and the undertaker are knocking at the door. It will not do to say that any occupation which may remotely affect the public health is subject to this kind of legislation and control. Our health, our comfort, and our well-being are materially affected by all of our surroundings—by the houses we live in, the clothes we wear, and the food we eat. The safety of the traveling public depends in no small degree on the skill and capacity of the section crews that build and repair our railroads, yet are we on this account to add the architect, the carpenter, the tailor, the shoemaker, those who produce and prepare our food, and all the rest to the ever-growing list? If so, it will be but a short time before a man cannot engage in honest toil to earn his daily bread without first purchasing a license or permit from some board or commission. The public health is entitled to consideration at the hands of the legislative department of the government, but it must be remembered that liberty does not occupy a secondary place in our fundamental law. Under some of the Acts to which we have referred members of the board of health form part of the examining board, but our Act has not even this saving grace. By its terms two master plumbers and one journeyman plumber are constituted the guar-

dians of the public health and welfare. We are not permitted to inquire into the motive of the legislature, and yet, why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view. We are satisfied that the Act has no such relation to the public health as will sustain it as a police or sanitary measure, and that its interference with the liberty of the citizens brings it in direct conflict with the Constitution of the United States."

The Legislature of Arkansas passed an Act in 1929 patterned after and almost identical with the Act here involved. The validity of this Act was questioned in *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.* and *Arkansas Railroad Commission* v. *Castetter et al.*, 22 S. W. (2d) 993, and the Supreme Court of that State held the Act invalid insofar as it provided that the railroad commission should not issue certificates to anyone authorizing the manufacture, sale or distribution of ice at a given point where facilities already existing were sufficient to meet the public needs, and providing procedure for carrying the provisions into effect, etc., unconstitutional, and held that the declaration that the ice business is one properly the subject of governmental regulation was not arbitrary or unreasonable. The syllabus reading:

"Acts 1929, No. 55, p. 110, paragraph 15, providing that railroad commission shall not issue certificate to any person, firm or corporation authorizing manufacture, sale or delivery of ice at any given point where facilities already existing are sufficient to meet public needs, Section 16, providing procedure for carrying

provisions into effect, and Section 17, providing that joint operation of facilities for manufacture, sale or distribution of ice may be authorized where expenses may be thereby decreased, held to violate Const., Art. 2, paragraph 2, guaranteeing right to acquire and possess property, Section 3, providing no citizen shall be deprived of any right, privilege, or immunity, Section 18, prohibiting grant of privileges which upon same terms shall not belong equally to all citizens, Section 19, prohibiting monopolies and perpetuities, and Section 29, declaring that all laws contrary to provisions of article shall be void.

"Legislative declaration in Acts 1929, No. 55, p. 110, that ice business is one properly the subject of government regulation, is not arbitrary or unreasonable, and must be upheld by court."

The effect of this decision is that all who desire may engage in the ice business, but they are subject to governmental regulation as to their charges, practices, etc.

This case seems to have been based solely upon the provision of the State Constitution, and upon the assumption that the business was a monopoly.

No appeal provided.

The Act is void for another reason, which is that there is no appeal from the order of the Corporation Commission granting or refusing a license. The only provision for an appeal is found in Section 6 of the Act, which reads as follows:

"All and any orders made by said Commission fixing

> rates, charges, rules and regulations as to any person, firm or corporation engaged in the manufacture, sale or distribution of ice, or either of them, may be reviewed on appeal by the Supreme Court of the State of Oklahoma."

This provision is plain, and by it the only orders from which an appeal will lie are those fixing rates, charges, rules and regulations as to any person, firm, or corporation engaged in the business. There is no right of appeal from the action of the Commission in granting, or refusing, a license to engage in business. Hence the action of the Commission in granting, or refusing, a license is conclusive. By the provisions of Section 7 of this Act, if any person, firm or corporation engaged in the business without first obtaining a license they shall be deemed guilty of a misdemeanor, and any such person (but not a corporation) shall be fined $25.00 for each day's violation, and in addition to this, the Corporation Commission is granted the power to impose a fine of $500.00 for each of said violations. No appeal is allowed.

It is well settled that the right of appeal exists only where expressly given by constitutional provisions or legislative enactments, and the right cannot be extended to cases which do not come within the Constitution or statute. *Muskogee County et al.* v. *Muskogee Gas & Electric Co.*, 83 Okla. 167, and cases there cited.

In *Oklahoma Operating Co.* v. *Love et al.*, 252 U. S.

331, 40 Sup. Ct. Rep. 338, the Corporation Commission has made an order fixing rates for laundry work in Oklahoma City. An injunction was sought in the Federal court for the Western District, and was denied. On appeal to the Supreme Court the judgment was reversed, the court holding that:

> "Rev. Laws of Oklahoma 1910, Sec. 8235, construed by the State court as authorizing no review of the orders of the Commission fixing rates, except by an appeal in contempt proceedings for violation of the order, which violation may be punished by a penalty of $500.00 per day, is unconstitutional so far as it provides for the enforcement of the prescribed rates by penalties, because of the absence of an opportunity for a judicial review satisfying the constitutional requirements."

And in *Oklahoma Gin Company* v. *State of Oklahoma*, 255 U. S. 339, Sup. Ct. Rep. 341, the syllabus reads:

> "Rev. Laws Okla. 1910, Sec. 8235, so far as it provides penalties for disobedience of orders of the Corporation Commission fixing rates, violates the Fourteenth Amendment, because of the lack of any opportunity for judicial review of such orders."

It will be noted that the Legislature sought to remedy the defect invalidating the statute, by enacting what is now Sections 11046 and 11050, Comp. St. 1921, providing that in all cases where not otherwise provided by specific legislation, for actions arising under the anti-trust laws, and prosecuted before the Corporation Commission, to-wit: Section 45, Article 9, Constitution of Oklahoma, and Chap-

ter 79, Sections 8220-8241, both inclusive, Revised Laws of 1910, the same laws and rules as to procedure, notice and appeal shall apply as are prescribed for transportation and transmission companies in the Constitution of Oklahoma, and other laws of that State applicable thereto.

This statute can have no effect here, for by its terms it excepts cases provided for by specific legislation. Hence, we must look alone to Chapter 147, Session Laws 1925, to determine what remedy, if any, is afforded for a refusal to grant a license.

In *Grand Rapids & I. Ry. Co.* v. *Hunt,* 78 N. E. 358, the appellate court of Indiana held:

> "Under Acts 1905, p. 88, c. 53, paragraph 6, authorizing a railroad company to appeal to the Appellate Court from any 'rate, classification, rule, charge, or general regulation,' adopted by the railroad commission, no appeal lies to the Appellate Court from an order of the commission requiring the installation of an interlocking device at a crossing, the order not coming within the duties exercised by the commission as to 'rate, classification, rule, charge, or general regulation.'"

Counsel for appellant cite *Pioneer Telephone & Telegraph Co.* v. *State,* 40 Okla. 417; 138 Pac. 1033 as holding that an appeal lies. This case involved a transmission company, and an appeal is specifically provided for by Section 20, Article 9, of the State Constitution.

In *Baker* v. *Capshaw,* 130 Okla. 86, 65 Pac. 115 and *In Re Farmers Co-operative Gin Co.,* 122 Okla. 115; 251 Pac.

829, the court was dealing with the "Gin Act" Section 5 of which provides that the orders of the Corporation Commission "may be reviewed on appeal by the Supreme Court in the same manner, form, jurisdiction and procedure as applied to such orders made relative to transportation and transmission companies." The effect of this Act, so far as an appeal is concerned, is to place gins on a par with transportation and transmission companies.

In *Ex Parte Tindall,* 102 Okla. 192, 229 Pac. 125, cited by appellant, the court treated the petitioner as a "transportation company" and applied the rules of law applicable to such companies. This is made clear by the language used. The court said:

> "Bearing in mind that the business of petitioner is that of a 'transportation company' for hire, and therefore a 'public service enterprise' and subject to state control, keeping in mind, also that the state may exercise control over the public highways, and that this is a business seeking to appropriate the public highways to its own use as a roadbed, seeking to charge the public a profit for a service to be rendered over the public highways, there is no merit in the contention that the state, within the sphere of its police power, cannot exercise a reasonable control over such business."

None of the cases cited by appellant are controlling here. The ice act is complete within itself and we must, it seems to us, look to that act alone to determine whether a review is provided for.

The penalties imposed for the violation of the Act are so severe as to render the Act unconstitutional.

It is apparent, from the language used, that it was the purpose of the Act to prevent an appeal from the action of the Commission in refusing a license, and to impose penalties so enormous and sereve as to intimidate persons who had been denied a lecense from resorting to the courts to test the validity of the Act, for the only way in which the validity of the Act could be questioned would be by a violation thereof, which would subject one to prosecution for a misdemeanor, and a fine of $25.00 per day, by the courts, and a fine of $500.00 per day by the Commission, if he should be wrong in his contention that the Act was unconstitutional.

If what we have said is true, then the Act is violative of the Fourteenth Amendment to the Constitution of the United States, in that it deprives one of his property without due process of law and denies him the equal protection of the laws. It is also violative of Section 6 and Section 7 of Article 2 of the Constitution of the State of Oklahoma.

In *Ex Parte Young,* 209 U. S. 123, 28 Sup. Ct. 441, it is held:

> "4. A statute providing for the establishment of rates for railroad transportation without giving the corporation an opportunity to be heard, which fixes penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to

the courts to test the validity of the rates, it unconstitutional, as depriving the corporations of the equal protection of the laws." (The question is discussed at length in the body of the opinion.)

In *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 33 Sup. Ct. 961, it is said:

"The imposition of Kansas Laws 1905, Chap. 353, of a liability of $500.00 as liquidated damages, together with a reasonable attorney's fee, for every charge by a common carrier in excess of the rates therein fixed for the shipments of oil betwen points in the State, takes property without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution."

In the body of the opinion the court says:

"The State court, although recognizing that the solution of the problem is not free from difficulty, reached the conclusion that 'So long as the defendant (the carrier) cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guarantees of the Federal Constitution are not infringed.' But that this view fails to recognize the real plight of the carrier is made plain by the following extract from the opinion in *Ex Parte Young*, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 765:

"'If the law be such as to make the decision of the Legislature or of a Commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Coms. Rep. 209, 10 Sup. Ct. 462, 702.

"'A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the

right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of the laws which deeply affect its rights.'"

In *Wadley Southern Railway Co.* v. *State of Georgia*, 235 U. S. 651, 35 Sup. Ct. Rep. 214, the third syllabus reads as follows:

"A state statute under which enormous penalties are imposed upon a railway company for violating lawful administrative orders of the State railroad commission is void under the U. S. Const., 14th Amend., although such orders are made after full hearing before the commission, if access to the courts to test the constitutional validity of the commission's orders is denied, or if the right of review actually given is one of which the carrier may avail itself only at the risk of having to pay such penalties if the order is found to be valid."

If Chapter 147, Session Laws of 1925, is valid, there is no limitation upon the power of the Legislature to regulate, control or prohibit any business, conducted in such a manner as to make it of public consequence or to effect the community at large as to supply, demand or price or rate thereof. All that is necessary is an Act placing any business under the jurisdiction of the Corporation Commission, for, "In a sense, the public is concerned about all

lawful business because it contributes to the prosperity and well-being of the people." *Chas. Wolff Packing Co.* v. *Court of Industrial Relations, supra.*

We will not attempt to here discuss the numerous cases cited by appellant which, to our minds, have no bearing upon the issues in this case, but will merely refer briefly to the principal cases upon which the appellant relies as authority for bringing this suit.

Its contention that it has franchise rights, which will be violated if the defendant is permitted to engage in business in competition with it, is based upon *Frost v. Corporation Commission*, 278 U. S. 515, 49 Sup. Ct. Rep. 245, wherein the court was construing the statutes of the state relating to cotton gins. Section 3712, Comp. Statutes 1921, declared cotton gins to be public utilities, and the operation of the same for the purpose of ginning seed cotton to be a public business, and Section 3713, provided that no person or corporation in the state should operate a gin for the purpose of ginning seed cotton without first having secured a license for such purpose from the Corporation Commission, etc. In discussing the question there presented the court said:

> "It already appears that cotton gins are declared by the Oklahoma statute to be public utilities, and their operation for the purpose of ginning seed cotton to be public business. No one can operate a cotton gin for such purpose without securing a permit from the Commission. In their regulation and control, the Commis-

sion is given the same authority which it has in respect of transportation and transmission commissions, and the same power to fix rates, charges and regulations. Comp. Stats. 1921, paragraphs 2713, 3713, 3715. Under section 3714, as amended, *supra* (laying the proviso out of consideration for the moment), the commission may deny a permit for the operation of a gin where there is no public necessity for it, and may authorize a new ginning plant only after a showing is made that such plant is a needed utility. Both parties definitely concede the validity of these provisions, and, for present purposes, at least, we accept that view."

It will be observed from this language that the validity of the act declaring cotton gins public utilities was definitely conceded by both parties. The court called attention to this fact, and stated that for the purpose of that case that view was accepted. This statement of the court, to our mind, indicates that the court doubted the validity of the act, but inasmuch as the question of the validity thereof was not raised, but was conceded, it merely construed the statute.

The right of the legislature to declare a private business a public one was not involved in that case.

Counsel for appellant admitted at the trial that its alleged "franchise" was not exclusive, and it could not be reasonably contended that this license was an exclusive [illegible] We would sustain the act as violative [illegible] Article 2 of the Constitution of the State,

"Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. * * *." See *City of Okmulgee* v. *Okmulgee Gas Co.*, 282 Pac. 641.

and of Section 7 of Article 18 of the State Constitution, providing:

"and no exclusive franchise shall ever be granted,"

and of Section 5, Article 18 of the Constitution, which provides that:

"No municipal corporation shall ever grant, extend or renew a franchise, without the approval of a majority of the qualified electors residing within its corporate limits, etc. * * *,"

and said act violates Section 51, Article 5 of the State Constitution, which reads:

"The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State,"

and said act violates Section 2 of Article 2 of the Bill of Rights, which reads:

"All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."

See *State ex rel. Short, Attorney General*, v. *Riedell et al.*, 109 Okla. 35, as well as Section 7, Article 2, providing:

"No person shall be deprived of life, liberty, or property without due process of law."

In *Chickasha Cotton Oil Company* v. *Cotton County Gin Company*, 40 Fed. (2d) 846, cited by appellant, the

Court held the "Gin" law valid, basing its decision upon the fact that the legislature had by the act declared cotton gins to be public utilities, and upon the nature of the service rendered. In the course of the opinion by Judge Phillips, it is said:

> "Cotton farmers, as a class, are not financially independent. An ordinary cotton farmer cannot afford to own and operate his own gin. Because his margin of profit is small, he cannot afford to haul his cotton a great distance to have it ginned. He must patronize a cotton gin located within accessible distance to his farm."

There is no similarity between the service rendered by a cotton gin, and the manufacture, sale and distribution of ice.

The cotton gin merely renders a service for a stated charge. In rendering this service its business compares with that of the threshing machine. It does not manufacture, or sell, anything, but merely separates the seed from the lint cotton and bales the lint for the owner. A gin is built and the business conducted solely to furnish this service to the public. The cotton grower can gin his cotton in no other way.

The manufacturer of ice does not render a service. He manufactures and sells a commodity. He may sell, or refuse to sell, to whom he pleases. He may deliver his ice, or sell it at the plant. He is not compelled to sell, but may suspend or discontinue his operations at will. The business is a

common occupation, which may be engaged in by anyone. There is no distinction between the business of selling ice, and that of selling groceries, meats, bread, milk or any of the other necessities or conveniences of life. So common is the business that many persons manufacture ice for their own use, with individual plants in their homes (and a strict construction of the act in question will render all those who make their own ice guilty of a misdemeanor, unless they obtain a license from the Corporation Commission).

That the business of the manufacture, sale and distribution of ice was not a monopoly before the statute was passed is clear. Prior to the enactment of the act in question one could purchase ice from whom he pleased, and much cheaper than under the act. The evidence clearly shows that the business was not a monopoly, and the facts and circumstances clearly demonstrate that the sole purpose of the act is to protect the appellant, and a few other large interests, from competition, and that the act is being administered solely to that end is likewise clear.

The only attempt made to show that the business was monopolistic was that in various towns in the state there was but one ice plant, and the appellant's witness who testified to this fact, also testified that ice was shipped and hauled in trucks to the smaller places, and even delivered to the rural communities. It is in evidence that ice may be shipped by rail and hauled in trucks great distances, so it

is clear that the people in one community are not compelled to buy of their local dealer. The fact that because there is but one plant in some of the smaller towns, and none in others cannot make of it a public business. In many of the smaller towns there is but one drug store, one meat market, one grocery store and one garage, but that does not make these businesses public, or authorize the Legislature to regulate or prohibit them.

It is manifest that the declaration of the Legislature that the manufacture, sale and distribution of ice is a public business, does not make it such, and it is likewise manifest that if the "business of the butcher, the baker, the tailor, the wood chopper, the mining operator, or the miner," is not clothed with such a public interest that the price of his product or wages can be fixed by state regulation, that the business of the man who manufactures and sells ice is not clothed with a public interest. He is the manufacturer of his products, the same as the manufacturer of any other product manufactured and sold, and if the state has the right to control his business, and to say who shall and shall not engage in the business, then the business of the foundryman, the machine shop, the garage, the oil refiner, the grocer, the butcher, the druggist, the plumber, the shoe maker, the shoe shop and the shoe shining establishment may be controlled by the State through the Corporation Commission. In fact, there is no business which could not

be so controlled, or if the legislature should so decree, be prohibited.

The appellant introduced the report of the Corporation Commission in which this commission sought control of the ice business, and in its brief, insist that this is evidence of the nature of the business. If these reports are competent for any purpose, it is merely to show that the commission, like every other board or commission in the land, was anxious to bring to itself more power, and a wider range of jurisdiction. What effect have these recommendations upon the constitutionality of this law?

The appellant cites *City of Tombstone* v. *Macia*, 245 Pac. 677; *Holton* v. *City of Camilla*, 68 S. E. 472 and *City of Denton* v. *Denton Home Ice Co.*, 18 S. W. (2nd) 608, holding that a municipal ice plant constitutes a public purpose for taxation, and while those cases have little or no bearing upon the question here presented, because the question of the right of the individual to engage in business was not involved, we may cite *Union Ice & Coal Co.* v. *Ruston*, 135 La. 898, 66 So. 262; *State* v. *O'Rear*, 227 Mo. 303, 210 S. W. 392; *State* v. *Thompson*, 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339, Ann. Cas, 1913C 744, as holding that a municipal ice plant does not constitute a public purpose for taxation.

The Supreme Court of Georgia in *Hilton* v. *Camilla*, *supra*, based its decision largely on the proposition that if

a waterworks delivering water through pipes constitutes a public utility, then a plant delivering frozen water (ice) by wagons is likewise a public utility. This reasoning is so strikingly answered by the Louisiana court in *Union Ice & Coal Co.* v. *Ruston, supra,* that we quote briefly from that case:

> "The same line of reasoning here adopted by the Supreme Court of Georgia having been presented incidentally by counsel in the case of *State* v. *Thompson,* 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339, Ann. Cas. 1913C 774, in the Supreme Court of Wisconsin, Judge Timlin, in a concurring opinion, made the following answer to it:
>
> "'It was said by counsel in argument that the furnishing of water by a city to its inhabitants is a municipal affair; that ice is but frozen water; hence the furnishing of ice must be a municipal affair. But things which are similar from a physical or chemical viewpoint may be dissimilar from the legal viewpoint. Under a statute authorizing a city to buy coal, it probably could not buy diamonds, although it is said that they are chemically identical. NEITHER IS ATMOSPHERIC GAS PASSED THROUGH A VARYING APERTURE AND ARTICULATED BY VARYING CONTACTS ALWAYS EQUIVALENT TO ARGUMENT. The difference between the collection and distribution of water by means of pipes laid in the streets and the manufacture, sale and distribution of ice is that the first is in the nature of a monopoly, while the second is a competitive business enterprise. The first does not depend so largely upon skill in management.'
>
> "Putting aside the frozen water argument of the Georgia court as having been well answered by the amusing witticism of the Wisconsin court, we note that, as pointed out by the Wisconsin court, all analogy

between the municipal distribution of water and the municipal distribution of ice is destroyed by the fact that for the one business pipes have to be laid in the public streets, and necessarily for doing this, the streets have to be torn up and disturbed, whereas the other is a purely competitive business enterprise. There would be analogy betwen the two if the city were to abandon the sovereign mode of water distribution by means of underground conduits through the public streets, and to peddling the liquid as is done in towns unprovided with water works and unblessed with a sufficient rainfall for gathering a supply in cisterns, as has to be done with ice. There would then be complete analogy; but everybody would then see that the town was no longer discharging a sovereign function, but carrying on a private enterprise."

We will not further comment upon the cases cited by appellant. These cases are not conclusive, nor even persuasive here.

Appellant complains of the action of the Circuit Court of Appeals in referring to the Ice Blue Book wherein it is shown that the price of ice is higher in Oklahoma than in eleven other southern states. This book is a standard authority, is the official publication of the National Association of Ice Industries, of which association L. C. Smith, one of appellant's chief witnesses, was secretary and the information therein contained can be relied upon as being correct.

The information contained in this book shows the beneficial effect the Ice Act has had upon the ice industry in

Oklahoma, and shows the injurious effect the Act has had upon the public.

We challenge the statement of the appellant that the record shows a decline in the price of ice, improvement in the service, kind, quality and character of ice after the passage of the Act, but on the contrary we assert that the record shows that the price of ice increased after the Act took effect, and that now the price of ice is greater in this state than in the eleven other southern states mentioned, in none of which is competition in the business prohibited.

We desire to call the court's attention to facts we deem significant, which are that there is not a word in the record indicating that the Corporation Commission has at any time since the passage of the Act fixed the price of ice, and that the improved conditions testified to by appellant's witness Hill, were brought about by the acts of the manufacturers without the aid of the Corporation Commission.

The business of the packing plant is not such a business as is affected with a public interest, *Wolff Packing Co.* v. *Court of Industrial Relations of Kansas, supra.* Yet meat is a necessity, and used by all. The creamery business is not clothed with a public interest, *Fairmont Creamery Co.* v. *State of Minnesota, supra,* though we all use butter. The business of the baker is not clothed with a public interest though it is more necessary to life than ice, *Burns Baking Co.* v. *Bryan, supra.* The business of manufacturing bed

clothing is private, regardless of a legislative declaration to the contrary, *Weaver* v. *Palmer Bros. Co., supra.* The drug store remains the property of its owner, and the business is not affected with a public interest, *Louis K. Liggett Co.* v. *Baldridge et al., supra,* and the manufacture and sale of gasoline is not affected with a public interest, *Williams* v. *Standard Oil Co., supra,* regardless of the fact that it furnishes the motive power with which the individual may transport the commodities mentioned to his home, and regardless of the fact that it is universally used to transport ice from the plant to the consumer.

The Act, on its face, shows that it bears no reasonable relation to any evil sought to be prevented; that its purpose is not to protect the public, or to regulate any business that is injurious to the health, morals or welfare of the people, but that its sole purpose is to create and foster a monopoly in the ice business of which the appellant is one of the chief beneficiaries. That the act is so administered is clear from the appellant's evidence. Prohibition and not regulation is the purpose and effect of the act.

We are not ready to concede that the State has the right or power to regulate and control the private business of its citizens, or to prohibit, or authorize the Corporation Commission to prohibit its citizens, or any of them, from engaging in a lawful occupation. If it has this right, then the guaranties embodied in the Fourteenth Amendment to

the Federal Constitution have been withdrawn from those of us who are unfortunate enough to reside in this State.

We submit that the Act in question is unconstitutional, inoperative and void, and that the judgment of the Circuit Court of Appeals should be affirmed.

GEORGE M. NICHOLSON,
THOMAS H. OWEN,
M. A. LOONEY,
Solicitors for Appellee.

CORRECTED COPY pp. 21, 22, 23, 24

SUPREME COURT OF THE UNITED STATES.

No. 463.—October Term, 1931.

New State Ice Company, Appellant, vs. Ernest A. Liebmann. } Appeal from the United States Circuit Court of Appeals for the Tenth Circuit.

[March 21, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

The New State Ice Company, engaged in the business of manufacturing, selling and distributing ice under a license or permit duly issued by the Corporation Commission of Oklahoma, brought this suit against Liebmann in the federal district court for the western district of Oklahoma to enjoin him from manufacturing, selling and distributing ice within Oklahoma City without first having obtained a like license or permit from the commission. The license or permit is required by an act of the Oklahoma legislature, c. 147, Session Laws, 1925. That act declares that the manufacture, sale and distribution of ice is a public business; that no one shall be permitted to manufacture, sell or distribute ice within the state without first having secured a license for that purpose from the commission; that whoever shall engage in such business without obtaining the license shall be guilty of a misdemeanor, punishable by fine not to exceed $25, each day's violation constituting a separate offense, and that by general order of the commission, a fine not to exceed $500 may be imposed for each violation.

Section 3 of the act provides:

"That the Corporation Commission shall not issue license to any persons, firm or corporation for the manufacture, sale and distribution of ice, or either of them, within this State, except upon a hearing had by said Commission at which said hearing, competent testimony and proof shall be presented showing the necessity for the manufacture, sale or distribution of ice, or either of them, at the point, community or place desired. If the facts proved at

said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said commission at said point, community or place, are sufficient to meet the public needs therein, the said Corporation Commission may refuse and deny the applicant [application] for said license. In addition to said authority, the said Commission shall have the right to take into consideration the responsibility, reliability, qualifications and capacity of the person, firm or corporation applying for said license and of the person, firm or corporation already licensed in said place or community, as to afford all reasonable facilities, conveniences and services to the public and shall have the power and authority to require such facilities and services to be afforded the public; provided, that nothing herein shall operate to prevent the licensing of any person, firm or corportation now engaged in the manufacture, sale and distribution of ice, or either of them, in any town, city or community of this State, whose license shall be granted and issued by said Commission upon application of such person, firm or corporation and payment of license fee."

The portion of the section immediately in question here is that which forbids the commission to issue a license to any applicant except upon proof of the necessity for a supply of ice at the place where it is sought to establish the business, and which authorizes a denial of the application where the existing licensed facilities "are sufficient to meet the public needs therein." The district court dismissed the bill of complaint for want of equity, on the ground that the manufacture and sale of ice is a private business which may not be subjected to the foregoing regulation. 42 F. (2d) 913. The court of appeals affirmed. 52 F. (2d) 349.

It must be conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling or distributing ice, like that of the grocer, the dairyman, the butcher or the baker may be subjected to appropriate regulations in the interest of the public health cannot be doubted; but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated. If this legislative restriction be within the constitutional power of the state legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so. *Frost* v. *Corporation Commission*, 278 U. S. 515, 519-

521. In that view, engagement in the business is a privilege to be exercised only in virtue of a public grant, and not a common right to be exercised independently (*Id.*) by any competent person conformably to reasonable regulations equally applicable to all who choose to engage therein.

The *Frost* case is relied on here. That case dealt with the business of operating a cotton gin. It was conceded that this was a business clothed with a public interest, and that the statute requiring a showing of public necessity as a condition precedent to the issue of a permit was valid. But the conditions which warranted the concession there are wholly wanting here. It long has been recognized that mills for the grinding of grain or performing similar services for all comers are devoted to a public use and subject to public control, whether they be operated by direct authority of the state or entirely upon individual initiative. At a very early period a majority of the states had adopted general acts authorizing the taking and flowage, *in invitum*, of lands for their erection and maintenance. In passing these acts, the attention of the legislatures no doubt was directed principally to grist mills; but some of the acts, either in precise terms or in their application, were extended to other kinds of mills. *Head* v. *Amoskeag Manufacturing Company*, 113 U. S. 9, 16-19; *State* v. *Edwards*, 86 Me. 102, 104-106. The mills were usually operated by the use of water power, but this method of operation has been said not to be essential. *State* v. *Edwards, supra*, at p. 106. It was open to the proprietor of a mill to maintain it as a private mill for grinding his own grain, and thus free from legislative control; but if the proprietor assumed to serve the general public he thereby dedicated his mill to the public use and subjected it to such legislative control as was appropriate to that status. In such cases the mills were regarded as so necessary to the existence of the communities which they served as to justify the government in fostering and maintaining them, and imposing limitations upon their operation for the protection of the public. *Id.*

In *Chickasha Cotton Oil Co.* v. *Cotton County Gin Co.*, 40 F. (2d) 846, three circuit judges passed upon the constitutionality of the Oklahoma cotton ginning act. Opinions were delivered *seriatim*, all to the effect, but for varying reasons, that the business of operating cotton gins in Oklahoma was clothed with a public interest. One of the judges thought that the rule in respect

of grist mills should apply by analogy, on the ground of the similarity of service. The rule that mills whose services are open to all comers are clothed with a public interest was formulated in the light, and upon the basis, of historical usage, which had survived the limitations that otherwise might be imposed by the due process clause of the Fourteenth Amendment. While the cotton gin has no such background of ancient usage, and, as the opinion by Judge Phillips points out, there is always danger of our being led afield by relying over-much upon analogies, the analogy here is not without helpful significance.

In that connection we also may consider *Clark* v. *Nash*, 198 U. S. 361, and *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, which dealt with the cognate question of what is a public use in respect of which the right of eminent domain may be exercised. The cases involved a statute of the State of Utah, which declared:

"The cultivation and irrigation of the soil, the production and reduction of ores, are of vital necessity to the people of the State of Utah; are pursuits in which all are interested and from which all derive a benefit; and the use and application of the unappropriated waters of the natural streams and water courses of the State to the generation of electrical force or energy to be employed in industrial pursuits are of great public benefit and utility. So irrigation of land, the mining, milling, smelting or other reduction of ores, and such use and application of such waters for the generation of electrical power to be employed as aforesaid are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof." &c. 95, § 1, Laws of Utah, 1896.

In the *Nash* case, this court, applying that statute, sustained the condemnation of a right of way across the lands of one private owner for a ditch to convey water for the purpose of irrigating the lands of another private owner. The decision was rested explicitly upon the existence of conditions peculiar to the state. These conditions are epitomized in the legislative declaration above quoted. The court said (pp. 369-370) that its decision was not to be understood as approving the broad proposition that private property might be taken in all cases where the taking might promote the public interest and tend to develop the natural resources of the state, but, having reference to the conditions there appearing, "that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the

water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

This was followed in the *Strickley* case, where, mining being one of the chief industries of the state and its development peculiarly important for the public welfare, the condemnation of a right of way for an aerial bucket line across private lands, for the purpose of transporting ores from a mine in private ownership, was upheld under the same statute.

These cases, though not strictly analogous, furnish persuasive ground for upholding the declaration of the Oklahoma legislature in respect of the public nature of cotton gins in that state. The production of cotton is the chief industry of the State of Oklahoma, and is of such paramount importance as to justify the assertion that the general welfare and prosperity of the state in a very large and real sense depend upon its maintenance. Cotton ginning is a process which must take place before the cotton is in a condition for the market. The cotton gin bears the same relation to the cotton grower that the old grist mill did to the grower of wheat. The individual grower of the raw product is generally financially unable to set up a plant for himself; but the service is a necessary one with which, ordinarily, he cannot afford to dispense. He is compelled, therefore, to resort for such service to the establishment which operates in his locality. So dependent, generally, is he upon the neighborhood cotton gin that he faces the practical danger of being placed at the mercy of the operator in respect of exhorbitant charges and arbitrary control. The relation between the growers of cotton, who constitute a very large proportion of the population, and those engaged in furnishing the service, is thus seen to be a peculiarly close one in respect of an industry of vital concern to the general public. These considerations render it not unreasonable to conclude that the business "has been devoted to a public use and its use thereby, in effect, granted to the public." *Tyson & Brother* v. *Banton*, 273 U. S. 418, 434; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 535, 538; same case, 267 U. S. 552, 563, *et seq.*

We have thus, with some particularity, discussed the circumstances which, so far as the State of Oklahoma is concerned, afford ground for sustaining the legislative pronouncement that the business of operating cotton gins is charged with a public use,

in order to put them in contrast with the completely unlike circumstances which attend the business of manufacturing, selling and distributing ice. Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. See *Tyson & Brother* v. *Banton, supra,* pp. 437-438, and cases cited.

It has been said that the manufacture of ice requires an expensive plant beyond the means of the average citizen, and that, since the use of ice is indispensable, patronage of the producer by the consumer is unavoidable. The same might, however, be said in respect of other articles clearly beyond the reach of a restriction like that here under review. But, for the moment conceding the materiality of the statement, it is not now true, whatever may have been the fact in the past. We know, since it is common knowledge, that today, to say nothing of other means, wherever electricity or gas is available (and one or the other is available in practically every part of the country), anyone for a comparatively moderate outlay may have set up in his kitchen an appliance by means of which he may manufacture ice for himself. Under such circumstances it hardly will do to say that people generally are at the mercy of the manufacturer, seller and distributer of ice for ordinary needs. Moreover, the practical tendency of the restriction, as the trial court suggested in the present case, is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.

Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, "under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513, and authorities cited; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 113.

Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed. We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. It is said to be recent; but it is the character of the business and not the date when it began that is determinative. It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary. Nor is it a case of the protection of natural resources. There is nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition, subject, of course, to reasonable regulations prescribed for the protection of the public and applied with appropriate impartiality.

And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that Amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. This principle has been applied by this court in many cases. *Dorchy* v. *Kansas*, 264 U. S. 286; *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 267 U. S. 552; *Pierce* v. *Sisters*, 268 U. S. 510; *Nixon* v. *Herndon*, 273 U. S. 536; *Tumey* v. *Ohio*, 273 U. S. 510; *Manley* v. *Georgia*, 279 U. S. 1; *Washington* v. *Roberge*, 278 U. S. 116; *C., St. P., M. & O.* v. *Holmberg*, 282 U. S. 162; *Stromberg* v. *California*, 283 U. S. 359; *Near* v. *Minnesota*, 283 U. S. 697. In the case last cited the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection.

Decree affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 463.—October Term, 1931.

New State Ice Co., Appellant, vs. Ernest A. Liebmann. | On Appeal from the United States Circuit Court of Appeals for the Tenth Circuit.

[March 21, 1932.]

Mr. Justice Brandeis.

Chapter 147 of the Session Laws of Oklahoma, 1925, declares that the manufacture of ice for sale and distribution is "a public business"; confers upon the Corporation Commission in respect to it the powers of regulation customarily exercised over public utilities; and provides specifically for securing adequate service. The statute makes it a misdemeanor to engage in the business without a license from the Commission; directs that the license shall not issue except pursuant to a prescribed written application, after a formal hearing upon adequate notice both to the community to be served and to the general public, and a showing upon competent evidence, of the necessity "at the place desired;" and it provides that the application may be denied, among other grounds, if "the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community or place are sufficient to meet the public needs therein."

Under a license, so granted, the New State Ice Company is, and for some years has been, engaged in the manufacture, sale and distribution of ice at Oklahoma City, and has invested in that business $500,000. While it was so engaged, Liebmann, without having obtained or applied for a license, purchased a parcel of land in that city and commenced the construction thereon of an ice plant for the purpose of entering the business in competition with the plaintiff. To enjoin him from doing so this suit was brought by the Ice Company. Compare *Frost* v. *Corporation Commission*, 278 U. S. 515. Liebmann contends that the manufacture of ice for

sale and distribution is not a public business; that it is a private business and, indeed, a common calling; that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause; and that to make his right to engage in that calling dependent upon a finding of public necessity deprives him of liberty and property in violation of the Fourteenth Amendment. Upon full hearing the District Court sustained that contention and dismissed the bill. 42 F. (2d) 913. Its decree was affirmed by the Circuit Court of Appeals. 52 F. (2d) 349. The case is here on appeal. In my opinion, the judgment should be reversed.

First. The Oklahoma statute makes entry into the business of manufacturing ice for sale and distribution dependent, in effect, upon a certificate of public convenience and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades. The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service.[1] There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community and that, when it was so, absolute freedom to enter the business of one's choice should be denied.

Long before the enactment of the Oklahoma statute here challenged a like requirement had become common in the United States in some lines of business. The certificate was required first for railroads; then for street railways; then for other public utilities whose operation is dependent upon the grant of some special privi-

[1]Compare Sumner H. Slichter, "Modern Economic Society", p. 56, 326-328; Eliot Jones and T. C. Bigham, "Principles of Public Utilities", p. 70; Eliot Jones, "Is Competition in Industry Ruinous", 34 Quarterly Journal of Economics, 473, 488.

lege.[2] Latterly, the requirement has been widely extended to common carriers by motor vehicle which use the highways, but which, unlike street railways and electric light companies, are not dependent upon the grant of any special privilege.[3] In Oklahoma the certificate was required, as early as 1915, for cotton gins—a business then declared a public one, and, like the business of manufacturing ice, conducted wholly upon private property. Sess. Laws, 1915, c. 176, § 3. See *Frost* v. *Corporation Commission*, 278 U. S. 515, 517. As applied to public utilities, the validity under the Fourteenth Amendment of the requirement of the certificate has never been successfully questioned.

Second. Oklahoma declared the business of manufacturing ice for sale and distribution a "public business;" that is, a public utility. So far as appears, it was the first State to do so.[4] Of

[2]See Ford P. Hall, "Certificates of Convenience and Necessity", 28 Mich. L. Rev. 107, 276; Waldo O. Willhoft, "Certificates of Convenience and Necessity in Michigan", 10 Mich. State Bar Journal 257; Charles S. Hyneman, "Public Encouragement of Monopoly in the Utility Industries", Annals of American Academy of Political and Social Science, January, 1930, p. 160; 24 Col. L. Rev. 528. Professor Hall lists statutes of forty-three states, most of them enacted within the last 20 years, requiring a certificate for the operation of various classes of public utilities. Before the advent of the certificate of public convenience and necessity, similar but less flexible control over the entry of many public utilities into business was exercised through the grant of franchises, municipal or state. See Eliot Jones and T. C. Bigham, "Principles of Public Utilities", c. III. The certificate was first introduced into federal law by the Transportation Act, 1920, c. 91, § 402, pars. 18-20, 41 Stat. 456, 477. Compare Thomas H. Kennedy, "The Certificate of Convenience and Necessity Applied to Air Transportation", 1 Journal of Air Law 76.

[3]See D. E. Lilienthal and I. S. Rosenbaum, "Motor Carrier Regulation by Certificates of Necessity and Convenience", 36 Yale L. J. 163, "Motor Carrier Regulation: Federal, State, and Municipal", 26 Col. L. Rev. 954. Compare LaRue Brown and S. N. Scott, "Regulation of the Contract Motor Carrier Under the Constitution", 44 Harv. L. Rev. 530.

[4]Such a law has since been passed in Arkansas. Ark. Acts, 1929, No. 55. The State court held that the measure violated the State constitution insofar as it sanctioned denial of the right to engage in the ice business. Cap. F. Bourland Ice Co. *v.* Franklin Utilities Co., 180 Ark. 770. The provisions for the regulation of rates, attacked under the Fourteenth Amendment, were sustained. See 15 St. Louis L. Rev. 414. Bills declaring the business of manufacturing ice a public utility have been introduced in Kansas, Louisiana, Michigan, New York, and Texas. See 70 Ice & Refrigeration 425; 72 *id.* 172, 239; 74 *id.* 110; 76 *id.* 216, 217; H. P. Hill, "Commission Control of the Ice Industry", *ibid.* 80.

course, a legislature cannot by mere legislative fiat convert a business into a public utility. *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228, 230. But the conception of a public utility is not static.[5] The welfare of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water or any other necessary commodity or service. If the business is, or can be made, a public utility, it must be possible to make the issue of a certificate a prerequisite to engaging in it.

Whether the local conditions are such as to justify converting a private business into a public one is a matter primarily for the determination of the State legislature. Its determination is subject to judicial review; but the usual presumption of validity attends the enactment.[6] The action of the State must be held valid unless clearly arbitrary, capricious or unreasonable. "The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, . . ." *McLean* v. *Arkansas,* 211 U. S. 539, 547. Whether the grievances are real or fancied, whether the remedies are wise or

[5] "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. . . . It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." Munn *v.* Illinois, 94 U. S. 113, 133. See Thomas P. Hardman, "Public Utilities", 37 W. Va. L. Q. 250.

[6] O'Gorman & Young, Inc. *v.* Hartford Fire Insurance Co., 282 U. S. 251. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Sinking-Fund Cases, 99 U. S. 700, 718. See also Legal Tender Cases, 12 Wall. 457, 531; Trade-Mark Cases, 100 U. S. 82, 96. See James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harv. L. Rev. 129, 142.

foolish, are not matters about which the Court may concern itself.[1] "Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature." *Tanner* v. *Little*, 240 U. S. 369, 385. A decision that the legislature's belief of evils was arbitrary, capricious and unreasonable may not be made without enquiry into the facts with reference to which it acted.

Third. Liebmann challenges the statute—not an order of the Corporation Commission. If he had applied for a license and been denied one, we should have been obliged to enquire whether the evidence introduced before the Commission justified it in refusing permission to establish an additional ice plant in Oklahoma City. As he did not apply but challenges the statute itself, our enquiry is of an entirely different nature. Liebmann rests his defense upon the broad claim that the Federal Constitution gives him the right to enter the business of manufacturing ice for sale even if his doing so be found by the properly constituted authority to be inconsistent with the public welfare. He claims that, whatever the local conditions may demand, to confer upon the Commission power to deny that right is an unreasonable, arbitrary and capricious restraint upon his liberty.

The function of the Court is primarily to determine whether the conditions in Oklahoma are such that the legislature could not reasonably conclude (1) that the public welfare required treating the manufacture of ice for sale and distribution as a "public business"; and (2) that in order to ensure to the inhabitants of some communities an adequate supply of ice at reasonable rates it was necessary to give the Commission power to exclude the establish-

[1] Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." Chicago, Burlington & Quincy R. Co. *v.* McGuire, 219 U. S. 549, 569.

"Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government." Green *v.* Frazier, 253 U. S. 233, 240. See also Price *v.* Illinois, 238 U. S. 446, 451, 452; Rast *v.* Van Deman & Lewis, 240 U. S. 342, 357; Merrick *v.* N. W. Halsey & Co., 242 U. S. 568, 586, 587.

ment of an additional ice plant in places where the community was already well served. Unless the Court can say that the Federal Constitution confers an absolute right to engage anywhere in the business of manufacturing ice for sale, it cannot properly decide that the legislators acted unreasonably without first ascertaining what was the experience of Oklahoma in respect to the ice business. The relevant facts appear, in part, of record. Others are matters of common knowledge to those familiar with the ice business. Compare *Muller* v. *Oregon*, 208 U. S. 412, 419, 420. They show the actual conditions, or the beliefs, on which the legislators acted. In considering these matters we do not, in a strict sense, take judicial notice of them as embodying statements of uncontrovertible facts. Our function is only to determine the reasonableness of the legislature's belief in the existence of evils and in the effectiveness of the remedy provided. In performing this function we have no occasion to consider whether all the statements of fact which may be the basis of the prevailing belief are well-founded; and we have, of course, no right to weigh conflicting evidence.

(A) In Oklahoma a regular supply of ice may reasonably be considered a necessary of life, comparable to that of water, gas and electricity. The climate, which heightens the need of ice for comfortable and wholesome living, precludes resort to the natural product.[8] There, as elsewhere, the development of the manufactured ice industry in recent years[9] has been attended by deep-seated

[8]The mean normal temperature in the State from May to September is 76.4 degrees. Climatological Data, United States Weather Bureau, vol. xxxix, 1930, No. 13, p. 53. The mean normal temperature in January, the coldest month, is 38.3 degrees; in December, 39.2 degrees. *Ibid.* So far as appears, no natural ice is harvested in the State for commercial purposes. See Guy L. Andrews, "State Regulation of Ice Industry in Oklahoma," Refrigerating World, Sept. 1928, p. 32.

[9]The industry first assumed commercial importance in the United States about 1880. See Ice and Refrigeration Blue Book (10th ed.), pp. 12-18. Reports of the Bureau of the Census indicate that in 1869 there were only four establishments producing artificial ice; in 1879, 35; in 1889, 222; in 1899, 775. See Willard L. Thorp, "The Integration of Industrial Operation," United States Census Monographs, III, 1924, pp. 49, 50. In 1929, the Census of Manufactures shows 4,110 establishments making ice as their product of chief value. The Ice and Refrigeration Blue Book for 1927, p. 30, lists 7,338 plants actually producing ice for sale. It estimates the total production for that year at 52,202,160 tons, as against 4,294,439 tons, reported by the Bureau of the Census for 1899.

alterations in the economic structure and by radical changes in habits of popular thought and living. Ice has come to be regarded as a household necessity, indispensable to the preservation of food and so to economical household management and the maintenance of health.[10] Its commercial uses are extensive. In urban communities, they absorb a large proportion of the total amount of ice manufactured for sale.[11] The transportation, storage and distribution of a great part of the nation's food supply is dependent upon a continuous, and dependable supply of ice.[12] It appears from the record that in certain parts of Oklahoma a large trade in dairy and other products has been built up as a result of rulings of the Corporation Commission under the Act of 1925, compelling licensed manufacturers to serve agricultural communities[13]; and

[10]See Report of Committee on Fundamental Equipment, submitted to the President's Conference on Home Building and Home Ownership, December 3, 1931, p. 107; Elsie P. Wolcott, "Use and Cost of Ice in Families with Children", published by the Department of Public Welfare of the City of Chicago. Lack of ice, in hot seasons, results in constant waste and danger to health. It compels the purchase of food in small quantities at higher prices. The intimate relation of food preservation to health, and infant mortality, has long been recognized. Ordinary perishable foodstuffs, it is generally considered, cannot be safely kept at temperatures in excess of from 45 to 50 degrees. Report of Committee on Fundamental Equipment, *supra*, p. 110.

[11]See Walter R. Sanders, "Industrial Application of Refrigeration in the United States", Proceedings of the Fourth International Congress of Refrigeration, London, 1924, p. 967. It was testified that in Oklahoma City in April, 1930, 46.4 per cent of the sales of ice were to the retail trade, 37.12 per cent to the commercial trade, 13.81 per cent to the wholesale trade, 2.92 per cent for car icing, and the remainder for carload shipments out of the city. In 1922 there were loaded in Oklahoma 1676 cars of food products under refrigeration; in 1925, 2940 cars; and in 1929, 3347. The Ice and Refrigeration Blue Book (10th ed.), pp. 22, 23, lists 198 industries using refrigeration. In a great number of these it is impracticable to install a private ice plant.

[12]Were it not for refrigeration, the market for perishable foodstuffs, in warm seasons, would be limited in area to a few miles and in time to a few days, or even hours. A considerable part of this refrigeration is supplied by concerns manufacturing ice for sale. Such concerns commonly supply ice used in car-icing. Mechanical refrigeration is beyond the means of many small retail dealers. Moreover, since decay in food, once begun, cannot be arrested by subsequent refrigeration, ice, or a substitute, is often essential on the farm. See M. E. Pennington and A. D. Greenlee, "The Refrigeration of Dressed Poultry in Transit", Bulletin No. 17, U. S. Department of Agriculture, p. 31.

[13]More than 80 per cent of the milk and cream sold from farms in the United States is produced in sections where natural ice can be harvested. See

that this trade would be destroyed if the supply of ice were withdrawn.[14] We cannot say that the legislature of Oklahoma acted arbitrarily in declaring that ice is an article of primary necessity, in industry and agriculture as well as in the household, partaking of the fundamental character of electricity, gas, water, transportation and communication.

Nor can the Court properly take judicial notice that, in Oklahoma, the means of manufacturing ice for private use are within the reach of all persons who are dependent upon it. Certainly it has not been so. In 1925 domestic mechanical refrigeration had scarcely emerged from the experimental stage.[15] Since that time, the production and consumption of ice manufactured for sale, far from diminishing, has steadily increased.[16] In Oklahoma the mechanical household refrigerator is still an article of relative luxury.[17] Legislation essential to the protection of individuals of limited or no means is not invalidated by the

---

U. S. Department of Agriculture, "Cooling Milk and Cream on the Farm", Farmers' Bulletin No. 976, p. 1. The dairy industry in Oklahoma, however, is wholly dependent upon artificial ice, or its substitutes. Refrigeration on the farm is indispensable to the safe marketing of dairy products, at any season when the temperature exceeds 50 degrees. See John T. Bowen, "The Application of Refrigeration to the Handling of Milk", Bulletin No. 98, U. S. Department of Agriculture, pp. 2, 65 *et seq.*

[14]The power of the Commission to compel this service, of course, depends upon the status of the ice business as a public utility. The evidence shows that the distribution of ice in rural communities not themselves possessing ice plants has developed almost wholly since the passage of the Act of 1925. There was testimony that such distribution would be impracticable without the protection afforded by the Act.

[15]The total number of household refrigerators in the entire country manufactured and sold before 1920 was approximately 10,000. In 1924, the annual production reached 30,000; in 1925, 75,000. Electrical Refrigerating News, February 17, 1932.

[16]The Secretary of the National Association of Ice Industries testified that the ice business for the last eleven years had increased upon an average of 5.35 per cent each year; that in 1919 the per capita consumption of ice was 712 pounds; in 1929, 1157 pounds. A great deal of the increase in consumption of ice in Oklahoma, another witness testified, was in rural communities and among urban dwellers of the poorer classes.

[17]The number of domestic electric meters installed in Oklahoma as of August 31, 1930, was only 222,237, according to a tabulation of the Bureau of Foreign and Domestic Commerce. The population of the State in 1930 was 2,396,000, Fifteenth Census, vol. I, p. 18. It is estimated that 965,000 household refrig-

circumstance that other individuals are financially able to protect themselves. The businesses of power companies and of common carriers by street railway, steam railroad or motor vehicle fall within the field of public control, although it is possible, for a relatively modes. outlay, to install individual power plants, or to purchase motor vehicles for private carriage of passengers or goods. The question whether in Oklahoma the means of securing refrigeration otherwise than by ice manufactured for sale and distribution has become so general as to destroy popular dependence upon ice plants is one peculiarly appropriate for the determination of its legislature and peculiarly inappropriate for determination by this Court, which cannot have knowledge of all the relevant facts.

The business of supplying ice is not only a necessity, like that of supplying food or clothing or shelter, but the legislature could also consider that it is one which lends itself peculiarly to monopoly.[18] Characteristically the business is conducted in local

---

erators were sold in 1931, of which only 10,146 were sold in Oklahoma. Electrical Refrigerating News, February 24, 1932. Approximately 3,578,000 such refrigerators are now in use throughout the country. *Id.*, February 10, 1932. From these figures it may be calculated that the number of refrigerators in use in Oklahoma is between 35,000 and 40,000. The average cost of a household electric refrigerator in 1925 was $425; in 1931, $245. Electrical Refrigerating News, February 17, 1932. The price of ice for domestic use in Oklahoma varies from 40 to 70 cents the hundredweight. Few families use as much as three or four tons of ice in a year. In view of these facts, this Court can scarcely have judicial knowledge that in Oklahoma all families or businesses which are able to purchase ice are able to purchase a mechanical refrigerator. See Report of Committee on Fundamental Equipment, submitted to the President's Conference on Home Building and Home Ownership, pp. 111, 128-129. This Committee found it impossible to recommend even an ordinary refrigerator, using ice, for families of low income, and suggested the design and marketing of a specially constructed ice-chest.

[18]It is noteworthy that the ice industry has the characteristic of uniformity of product or service common to most public utilities, and distinguishing it from other businesses in which differences in quality or style make difficult effective regulation. See S. Howard Patterson and Karl W. H. Scholz, "Economic Problems of Modern Life", (2d ed. 1931), p. 426.

The tendency of the industry to be conducted as a public utility is reflected in the widespread entry into it in recent years of electrical, gas, and water utilities, and the like. Such companies in Oklahoma operate more than one-third of the ice plants. See Ice and Refrigeration Blue Book (10th ed.), pp. 1268-88. Compare Oklahoma Light & Power Co. v. Corporation Commission, 96 Okla. 19, 24.

plants with a market narrowly limited in area,[19] and this for the reason that ice manufactured at a distance cannot effectively compete with a plant on the ground.[20] In small towns and rural communities[21] the duplication of plants, and in larger communities the duplication of delivery service,[22] is wasteful and ultimately burdensome to consumers. At the same time the relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served often causes managers to go to extremes in cutting prices in order to secure business.

Municipalities have engaged extensively in the business of manufacturing and selling ice in foreign countries, and to a lesser extent in the United States. On several occasions, departments of the Federal Government, unable to secure ice at what were regarded as reasonable prices, have installed their own ice plants. Both in the Philippine Islands and in Panama plants have been operated which sell ice to government employees. See Carl D. Thompson, "Public Ownership", pp. 301-305; Jeanie Wells Wentworth, "A Report on Municipal and Government Ice Plants", submitted to the Borough President of Manhattan, December 15, 1913.

[19]See Willard L. Thorp, "The Integration of Industrial Operation," United States Census Monographs, III, 1924, pp. 49, 50. Neither consolidation of ownership nor increase in production has had the effect of greatly increasing the size of plants in the ice business. Thus in Oklahoma in 1927 there were only twenty plants manufacturing ice for sale which had a capacity exceeding 200 tons a day, of which eight were in Oklahoma City and Tulsa. Ice and Refrigeration Blue Book (10th ed.), pp. 1268-1288.

[20]Several reasons were given in the testimony for this localization of the ice business. Freight rates on ice are high in proportion to value. Handling charges are doubled if the ice is put in cold storage at the point of consignment; and, if kept in the car, the ice loses in weight and deteriorates in quality during the period of a week or more before a carload will be exhausted in a small community. Shrinkage of course varies with the weather, but is at all times considerable.

[21]Oklahoma is predominantly a state of rural population. Only 34.3% of its inhabitants live in towns or cities of more than 2,500. Fifteenth Census of the United States, vol. I, p. 15. It has only four cities over 25,000; 12 cities from 10,000 to 25,000; and 52 cities from 2,500 to 10,000. There are 444 incorporated places of less than 2,500. *Ibid.*, pp. 895-98.

[22]See Editorials, Refrigerating World, May, 1928, p. 5, June 1, 1928, p. 6; J. H. Reed, "Consolidate Ice Delivery in Atlanta," *id.*, May, 1928, p. 15.

Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such competition, and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character.[23]

That these forces were operative in Oklahoma prior to the passage of the Act under review, is apparent from the record. Thus, it was testified that in only six or seven localities in the State containing, in the aggregate, not more than 235,000 of the total population of approximately 2,000,000, was there "a semblance of competition"[24]; and that even in those localities the prices of ice were ordinarily uniform. The balance of the population was, and still is, served by companies enjoying complete monopoly. Compare *Munn* v. *Illinois*, 94 U. S. 113, 131, 132; *Sinking Fund Cases*, 99 U. S. 700, 747; *Wabash, St. Louis & Pacific Ry. Co.* v. *Illinois*, 118 U. S. 557, 569; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354; *Budd* v. *New York*, 143 U. S. 517, 545; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 528. Where there was competition, it often resulted to the disadvantage rather than the advantage of the public, both in respect to prices and to service. Some communities were without ice altogether, and the State was without means of assuring their supply. There is abundant evidence of widespread dissatisfaction with ice service prior to the Act of 1925,[25] and of material improvement in the situa-

[23]See *e. g.*, John Nickerson, "Consolidations in the Ice Industry", 73 Ice & Refrigeration 333, 334; 69 *id.* 223; 70 *id.* 357; 72 *id.* 39; *ibid.* 282; Halbert P. Hill, "The Effect of Recent Mergers on the Ice Industry", Refrigerating World, February, 1926, pp. 15, 42; W. F. Stevens, "What the Future Holds for the Ice Manufacturer", 76 Ice & Refrigeration 81, 82; W. L. Foushee, "The Ice Business as a Public Utility", *ibid.* 302. See Tipton v. Ada Ice & Fuel Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 358.

[24]The Ice and Refrigeration Blue Book for 1927 shows that of 142 communities containing ice plants manufacturing ice for sale, at least 112 were served either by a single plant or by several plants of common ownership. See pp. 1268-1288, 1645 *et seq.* There is evidence in the record that it was common practice for manufacturing establishments of different ownership, to make use of a jointly-owned delivery company. Out of 217 plants listed as engaged in manufacturing ice for sale, 101 were owned by corporations owning or controlling other plants within or without the State. *Ibid.*

[25]For accounts of the situation in Oklahoma before the passage of the bill, see Guy L. Andrews, "Regulation of the Ice Business in Oklahoma," 75 Ice

tion subsequently. It is stipulated in the record that the ice industry as a whole in Oklahoma has acquiesced in and accepted the Act and the status which it creates.

(B) The statute under review rests not only upon the facts just detailed but upon a long period of experience in more limited regulation dating back to the first year of Oklahoma's statehood. For 17 years prior to the passage of the Act of 1925, the Corporation Commission under § 13 of the Act of June 10, 1908, had, exercised jurisdiction over the rates, practices and service of ice plants, its action in each case, however, being predicated upon a finding that the company complained of enjoyed a "virtual monopoly" of the ice business in the community which it served.[26] The jurisdiction thus exercised was upheld by the Supreme Court of the State in *Oklahoma Light & Power Co.* v. *Corporation Commission*, 96 Okla. 19. The Court said, at p. 24: "The manufacture, sale, and distribution of ice in many respects closely resemble the sale and distribution of gas as fuel, or electric current, and in many communities the same company that manufactures, sells, and distributes electric current is the only concern that manufactures, sells, and distributes ice, and by reason of the nature and extent of the ice business it is impracticable in that community to interest any other concern in such business. In this situation, the distributor of such a necessity as ice should not be permitted by reason of the impracticability of any one else engaging in the business to charge unreasonable prices, and if such

& Refrigeration 171, "State Regulation of the Ice Industry", *ibid.*, 437. In the year 1924, 375 formal complaints against ice companies are said to have been filed with the Commission.

[26]Okla. Sess. Laws, 1907-1908, c. 83: "Section 13. Whenever any business, by reason of its nature, extent or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence, or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this Act, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

an abuse is persisted in, the regulatory power of the State should be invoked to protect the public." See also *Consumers Light & Power Co.* v. *Phipps,* 120 Okla. 223.

By formal orders, the Commission repeatedly fixed or approved prices to be charged in particular communities;[27] required ice to be sold without discrimination[28] and to be distributed as equitably as possible to the extent of the capacity of the plant;[29] forbade short weights and ordered scales to be carried on delivery wagons and ice to be weighed upon the customer's request;[30] and

[27]Powers *v.* Mangum Ice & Cold Storage Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 354; Tipton *v.* Ada Ice & Fuel Co., *ibid.*, p. 358; Scanlon *v.* Sass, *ibid.*, p. 361; Worley *v.* Hill, *ibid.*, p. 390; Gillian *v.* Tishomingo Electric Light & Power Co., 4th Ann. Rep., p. 103; Wadlington *v.* Southern Ice & Utilities Co., 13th Ann. Rep., p. 235; In re General Investigation of Prices, Practices, Rates and Charges of the New State Ice Co., 15th Ann. Rep., p. 176; In re General Investigation of Prices, Practices, Rates and Charges of the Steffens-Bretch Ice & Ice Cream Co., *ibid.*, p. 177; McCartney *v.* Kingfisher Ice Co., *ibid.*, p. 210; In the Matter of the investigation of prices charged for ice at Guthrie, Oklahoma, by the Rummeli-Braun Co., *ibid.*, p. 212.

[28]Brenan *v.* Tishomingo Ice & Cold Storage Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 353; Tipton *v.* Ada Ice & Fuel Co., *ibid.*, p. 358; Scanlon *v.* Sass, *ibid.*, p. 361; Order No. 472, 4th Ann. Rep., p. 40; Nunnery *v.* Mangum Ice & Cold Storage Co., *ibid.*, p. 63; Order No. 641, 6th Ann. Rep., p. 7; Order No. 650, *ibid.*, p. 8; Order No. 708, *ibid.*, p. 10; Garner *v.* Tulsa Ice Co., 10th Ann. Rep., p. 336; Ratner *v.* Imperial Ice Co., 11th Ann. Rep., p. 205; Norton *v.* Chandler Ice Co., 12th Ann. Rep., p. 227; Vance *v.* Tahlequah Light & Power Co., 13th Ann. Rep., p. 194.

[29]In most instances of complaint of insufficient ice the Commission undertook to secure only the equitable distribution of the available supply; and the terms of the statute gave it no greater authority. See, *e. g.*, Powers *v.* Mangum Ice & Cold Storage Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 354; Gardiner *v.* Geary Light & Ice Co., *ibid.*, p. 403. But compare Ratner *v.* Imperial Ice Co., 11th Ann. Rep., p. 205; Ada *v.* Tipton Ice & Fuel Co., 2d & 8d Ann. Rep., p. 358. On no occasion, before 1925, did the Commission undertake to extend ice service to communities not theretofore supplied.

[30]Brenan *v.* Tishomingo Ice & Cold Storage Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 353; Powers *v.* Mangum Ice & Cold Storage Co., *ibid.*, p. 354; Tipton *v.* Ada Ice & Fuel Co., *ibid.*, p. 358; Scanlon v. Sass, *ibid.*, p. 361; Worley *v.* Hull, *ibid.*, p. 390; Ralston *v.* Hobart Ice & Bottling Co., 4th Ann. Rep., p. 110; In the Matter of Proposed Order No. 94, 6th Ann. Rep., p. 212, 7th *id.*, p. 266; Langan *v.* McCoy Bros., 8th & 9th Ann. Rep., p. 226; Ratner *v.* Imperial Ice Co., 11th Ann. Rep., p. 205; Norton *v.* Chandler Ice Co., 12th Ann. Rep., p. 227; Vance *v.* Tahlequah Light & Power Co., 13th Ann. Rep., p. 194.

undertook to compel sanitary practices in the manufacture of ice[31] and courteous service of patrons.[32] Many of these regulations, other than those fixing prices, were embodied in a general order to all ice companies, issued July 15, 1921, and are still in effect.[33] Informally, the Commission adjusted a much greater volume of complaints of a similar nature.[34] It appears from the record that for some years prior to the Act of 1925 one day of each week was reserved by the Commission to hear complaints relative to the ice business.

As early as 1911, the Commission in its annual report to the Governor, had recommended legislation more clearly delineating its powers in this field:

"There should be a law passed putting the regulation of ice plants under the jurisdiction of the Commission. The Commission is now assuming this jurisdiction under an Act passed by the Legislature known as the anti-trust law. A specific law upon this subject would obviate any question of jurisdiction."[35]

This recommendation was several times repeated, in terms revealing the extent and character of public complaint against the practices of ice companies.[36]

The enactment of the so-called Ice Act in 1925 enlarged the existing jurisdiction of the Corporation Commission by removing

---

[31]Gardiner *v.* Geary Light & Ice Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 403.

[32]Worley *v.* Hull, 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 390.

[33]Order No. 1906, 15th Ann. Rep. Okla. Corp. Comm., p. 178.

[34]See 8th & 9th Ann. Rep. Okla. Corp. Comm., p. 1.

[35]2d & 3d Ann. Rep. Okla. Corp. Comm., p. 8.

[36]In its Eighth and Ninth Annual Report, dated November 20, 1916, p. 5, the Commission said: "The scope of legislation pertaining to those utilities which serve the public generally should be broadened. Two conspicuous examples are ice plants and cotton compresses. Chapter 93, Session Laws, 1915, extends the jurisdiction of the Corporation Commission over water, heat, light, and power companies, but does not include ice plants. Numerous complaints are received by the Commission each year as to extortionate practices of ice companies and exorbitant prices charged. The same jurisdiction should be given the Corporation Commission over ice plants as it exercises over gas, electric and water companies."

In its Eleventh Annual Report, October 3, 1918, p. xxii, it was said: "The business of manufacturing and distributing ice is as much a matter of public concern as is the business of rendering water, electric or gas service and should be subject to the same regulation. Complaints are continuously being

the requirement of a finding of virtual monopoly in each particular case, compare *Budd* v. *New York*, 143 U. S. 517, 545, with *Brass* v. *Stoeser*, 153 U. S. 391, 402, 403; by conferring the same authority to compel adequate service as in the case of other public utilities; and by committing to the Commission the function of issuing licenses equivalent to a certificate of public convenience and necessity. With the exception of the granting and denying of such licenses and the exertion of wider control over service, the regulatory activity of the Commission in respect to ice plants has not changed in character since 1925. It appears to have diminished somewhat in volume.[37]

In 1916, the Commission urged, in its report to the Governor, that all public utilities under its jurisdiction be required to secure from the Commission "what is known as a 'certificate of public

made to the Commission in reference to prices of ice, practices of ice companies, or service rendered by such companies, and the Commission has frequently been called upon to exercise jurisdiction under the so-called Anti-Trust Laws. Specific legislation should be enacted in reference to these companies and the power of regulation should be made definite and certain."

Again, in the Twelfth Annual Report, November 18, 1919, p. 1: "During the past summer season numerous complaints against practices and rates of ice utilities have arisen from at least a hundred towns and cities throughout the State. The same jurisdiction should be given the Corporation Commission over ice plants as it exercises over gas, electric and water companies."

[37]Besides continuing in effect Order No. 1906, *supra* note 33, the Commission has issued further general orders pertaining particularly to accounting practices. Order No. 3843, 20th Ann. Rep. Okla. Corp. Comm., p. 562. In the following cases it has prescribed rates: In re Application of Marietta Ice & Water Co., 22d Ann. Rep., p. 601; In re Application for Reduction in Ice Rates Charged by the Sallisaw Ice Co., *ibid.*, p. 816; In re Reduction of Rates Charged by the Consumers Ice Co., *ibid.*, p. 859; In re Application of Southwestern Light & Power Co., 23d Ann. Rep., p. 755; In re Application of the Ward Ice Industries for Reduction in Ice Rates, *ibid.*, p. 757. In re Application of the Shawnee Ice Co. for increase of capacity in its plant, 22d Ann. Rep., p. 834, the applicant was allowed to withdraw its application, and the intervening application of E. A. Liebemann to erect a new plant was denied. In Burbank Ice Co. *v.* Kaw City Ice & Power Co., 23d Ann. Rep., p. 558, the defendant's permit to distribute ice in the town of Shidler was revoked upon a showing that it distributed during the summer months only and that the plaintiff's local plant was operated throughout the year, was adequate to meet local needs, and could not be maintained in the face of the defendant's competition. See also In re Application of New State Ice Co., *ibid.*, p. 748. Other formal orders of the Commission have been issued without opinion.

convenience and necessity' before the duplication of facilities.''

''This would prevent ruinous competition resulting in the driving out of business of small though competent public service utilities by more powerful corporations, and often consequent demoralization of service, or the requiring of the public to patronize two utilities in a community where one would be adequate.''[38]

Up to that time a certificate of public convenience and necessity to engage in the business had been applied only to cotton gins. Okla. Sess. Laws, 1915, c. 176, § 3. In 1917 a certificate from the Commission was declared prerequisite to the construction of new telephone or telegraph lines.[39] In 1923 it was required for the operation of motor carriers.[40] In 1925, the year in which the Ice Act was passed, the requirement was extended also to power, heat, light, gas, electric or water companies proposing to do business in any locality already possessing one such utility.[41]

Fourth. Can it be said in the light of these facts that it was not an appropriate exercise of legislative discretion to authorize the Commission to deny a license to enter the business in localities where necessity for another plant did not exist? The need of some remedy for the evil of destructive competition, where competition existed, had been and was widely felt. Where competition did not exist, the propriety of public regulation had been proven. Many communities were not supplied with ice at all. The particular remedy adopted was not enacted hastily. The statute was based upon a long-established State policy recognizing the public importance of the ice business, and upon 17 years' legislative and administrative experience in the regulation of it. The advisability of treating the ice business as a public utility and of applying to it the

[38]8th & 9th Ann. Rep. Okla. Corp. Comm., pp. 5, 6.

[39]Okla. Sess. Laws, 1917, [illegible]270.

[40]Okla. Sess. Laws, 1923, c. 113, § 4. This statute was held valid against objections under both the Federal and State Constitutions in Ex parte Tindall, 102 Okla. 192, and Barbour *v.* Walker, 126 Okla 227, 229. See also Chicago, R. I. & P. Ry. Co. *v.* State, 123 Okla. 190; Chicago, R. I. & P. Ry. Co. *v.* State, 126 Okla. 48. As to certificates of public convenience and necessity for the operation of a cotton gin, see Hohman *v.* State, 122 Okla. 45.

[41]Okla. Sess. Laws, 1925, c. 102, §§ 5, 6. Control over entry into these businesses, power and water plants, and the like, had theretofore been exercised by the requirement of a franchise from the municipality to be served. See Mayor and Councilmen of City of Pawhuska *v.* Pawhuska Oil & Gas Co., 28 Okla. 563, 568; Huffaker *v.* Town of Fairfax, 115 Okla. 73. Compare Okla. Const., art. IX, § 2, art. XVIII, § 5.

certificate of convenience and necessity had been under consideration for many years. Similar legislation had been enacted in Oklahoma under similar circumstances with respect to other public services. The measure bore a substantial relation to the evils found to exist. Under these circumstances, to hold the act void as being unreasonable, would, in my opinion involve the exercise not of the function of judicial review, but the function of a super-legislature. If the Act is to be stricken down, it must be on the ground that the Federal Constitution guarantees to the individual the absolute right to enter the ice business, however detrimental the exercise of that right may be to the public welfare. Such, indeed, appears to be the contention made.

Fifth. The claim is that manufacturing ice for sale and distribution is a business inherently private, and, in effect, that no state of facts can justify denial of the right to engage in it. To supply one's self with water, electricity, gas, ice or any other article, is inherently a matter of private concern. So also may be the business of supplying the same articles to others for compensation. But the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern. Whether it is, or is not, depends upon the conditions existing in the community affected.[42] If it is a matter of public concern, it may be regulated, whatever the business. The public's concern may be limited to a single feature of the business, so that the needed protection can be secured by a relatively slight degree of regulation. Such is the concern over possible incompetence, which dictates the licensing of dentists, *Dent* v. *West Virginia,* 129 U. S. 114, 122; *Douglas* v. *Noble,* 261 U. S. 165, 170; or the concern over possible dishonesty, which led to the licensing of auctioneers or hawkers, *Baccus* v. *State of Louisiana,* 232 U. S. 334, 338. On the other hand, the public's concern about a particular business may be so pervasive and varied as to require constant detailed supervision and a very high degree of regulation. Where this is true, it is common to speak of the business as being a "public" one, although it is privately owned. It is to such businesses that the designation "public utility" is com-

[42] "Plainly circumstances may so change in time or so differ in space as to clothe with such an [public] interest what at other times or in other places would be a matter of purely private concern." Block v. Hirsh, 256 U. S. 135, 155.

monly applied; or they are spoken of as "affected with a public interest." *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, 408.

A regulation valid for one kind of business may, of course, be invalid for another; since the reasonableness of every regulation is dependent upon the relevant facts. But so far as concerns the power to regulate, there is no difference, in essence, between a business called private and one called a public utility or said to be "affected with a public interest". Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitation upon that power. The source is the police power. The limitation is that set by the due process clause, which, as construed, requires that the regulation shall be not unreasonable, arbitrary or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained. The notion of a distinct category of business "affected with a public interest", employing property "devoted to a public use", rests upon historical error. The consequences which it is sought to draw from those phrases are belied by the meaning in which they were first used centuries ago,[43] and by the decision of this Court, in *Munn* v. *Illinois,* 94 U. S. 113, which first introduced them into the law of the Constitution.[44] In my opinion, the true

[43] In Lord Hale's "Treatise on the Ports of the Sea", Hargrave, "Law Tracts", pp. 77-78. Lord Hale was speaking of the particulars, wharves and cranes in ports; and did not purport to generalize the obligation to serve all persons at reasonable rates in other circumstances. See Breck P. McAllister, "Lord Hale and Business Affected With a Public Interest", 43 Harv. L. Rev. 759. He was speaking of duties arising at common law, and not of limitations upon the legislative power of Parliament. See J. A. McClain, Jr., "The Convenience of the Public Interest Concept", 15 Minn. L. Rev. 546. He could not have been speaking of such limitations, for in England they did not exist; and Parliament was accustomed to regulate prices of commodities of all kinds. See note 46, *infra.*

[44] Chief Justice Waite, who wrote the opinion, said generally, p. 126, "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large", and referred with approval to statutes regulating the prices of bread and the rates of chimney-sweepers, as well as of persons in other callings still regulated. See Walton H. Hamilton, "Affectation with a Public Interest", 39 Yale L. J. 1089, 1095-1096. See also German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 408.

principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible.

Sixth. It is urged specifically that manufacturing ice for sale and distribution is a common calling; and that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause. To think of the ice-manufacturing business as a common calling is difficult; so recent is it in origin and so peculiar in character. Moreover, the Constitution does not require that every calling which has been common shall ever remain so. The liberty to engage in a common calling, like other liberties, may be limited in the exercise of the police power. The slaughtering of cattle had been a common calling in New Orleans before the monopoly sustained in *Slaughter-House Cases*, 16 Wall. 36, was created by the legislature. Prior to the Eighteenth Amendment selling liquor was a common calling, but this Court held it to be consistent with the due process clause for a State to abolish the calling, *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Mugler* v. *Kansas*, 123 U. S. 623, or to establish a system limiting the number of licenses, *Crowley* v. *Christensen*, 137 U. S. 86. Every citizen has the right to navigate a river or lake, and may even carry others thereon for hire. But the ferry privilege may be made exclusive in order that the patronage may be sufficient to justify maintaining the ferry service, *Conway* v. *Taylor's Executor*, 1 Black 603, 633, 634.

It is settled that the police power commonly invoked in aid of health, safety and morals, extends equally to the promotion of the public welfare.[45] The cases just cited show that, while ordinarily free competition in the common callings has been encouraged, the public welfare may at other times demand that monopolies be created. Upon this principle is based our whole modern practice of public utility regulation. It is no objection

[45] Lake Shore & Michigan Southern Ry. Co. *v.* Ohio, 173 U. S. 285, 292; Chicago & Alton R. Co. *v.* Tranbarger, 238 U. S. 67, 77; Chicago, Burlington & Quincy Ry. Co. *v.* Drainage Board, 200 U. S. 561, 592; Bacon *v.* Walker, 204 U. S. 311, 317. "But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses." Chicago, Burlington & Quincy R. Co. *v.* McGuire, 219 U. S. 549, 567. Compare Walls *v.* Midland Carbon Co., 254 U. S. 300.

to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design. The certificate of public convenience and necessity is a device—a recent social-economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest. To grant any monopoly to any person as a favor is forbidden even if terminable. But where, as here, there is reasonable ground for the legislative conclusion that in order to secure a necessary service at reasonable rates, it may be necessary to curtail the right to enter the calling, it is, in my opinion, consistent with the due process clause to do so, whatever the nature of the business. The existence of such power in the legislature seems indispensable in our ever-changing society.

It is settled by unanimous decisions of this Court, that the due process clause does not prevent a State or city from engaging in the business of supplying its inhabitants with articles in general use, when it is believed that they cannot be secured at reasonable prices from the private dealers. Thus, a city may, if the local law permits, buy and sell at retail coal and wood, *Jones* v. *City of Portland*, 245 U. S. 217; or gasoline, *Standard Oil Co.* v. *City of Lincoln*, 275 U. S. 504. And a State may, if permitted by its own Constitution, build and operate warehouses, elevators, packinghouses, flour mills or other factories, *Green* v. *Frazier*, 253 U. S. 233. As States may engage in a business, because it is a public purpose to assure to their inhabitants an adequate supply of necessary articles, may they not achieve this public purpose, as Oklahoma has done, by exercising the lesser power of preventing single individuals from wantonly engaging in the business and thereby making impossible a dependable private source of supply? As a State so entering upon a business may exert the taxing power all individual dealers may be driven from the calling by the unequal competition. If States are denied the power to prevent the harmful entry of a few individuals into a business, they may thus, in effect, close it altogether to private enterprise.

Seventh. The economic emergencies of the past were incidents of scarcity. In those days it was preëminently the common callings that were the subjects of regulation. The danger then threatening was excessive prices. To prevent what was deemed extortion, the English Parliament fixed the prices of commodities and of services from time to time during the four centuries preceding the

Declaration of Independence.[46] Like legislation was enacted in the Colonies; and in the States, after the Revolution.[47] When the first due process clause was written into the Federal Constitution, the price of bread was being fixed by statute in at least two of the States, and this practice continued long thereafter.[48] Dwelling houses when occupied by the owner are preeminently private property. From the foundation of our Government those who wished to lease residential property had been free to charge to tenants such rentals as they pleased. But for years after the World War had ended, the scarcity of dwellings in the City of New York was such that the State's legislative power was invoked to ensure reasonable rentals. The constitutionality of the statute was sustained by this Court. *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170. Similar legislation of Congress for the City of Washington was also upheld. *Block* v. *Hirsh*, 256 U. S. 135.

Eighth. The people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions.[49] Some people believe

---

[46] "In Lord Hale's time . . . . all activity comprehended under what we call business, was public, and all of it subject to price control". Walton H. Hamilton, "Affectation With a Public Interest", 39 Yale L. J. 1089, 1094. For voluminous collections of statutes and materials relating to Parliamentary control of business in England prior to the American Revolution, see the references in Edward A. Adler, "Business Jurisprudence", 28 Harv. L. Rev. 135; J. A. McClain, Jr., "The Convenience of the Public Interest Concept", 15 Minn. L. Rev. 546; Breck P. McAllister, "Lord Hale and Business Affected With a Public Interest", 43 Harv. L. Rev. 759, 767.

[47] Statutes of eight of the thirteen States, passed during the Revolution, and fixing the price of almost every commodity in the market, are listed in 33 Harv. L. Rev. 838, 839.

[48] Maryland Laws of 1789, c. 8, § 2, Herty's Digest of the Laws of Maryland, 1799, p. 250; 5 Statutes of South Carolina 186, 1 South Carolina Acts of Assembly, 1791-1794, p. 88.

[49] See Hearings before the La Follette subcommittee of the Senate Committee on Manufactures, Seventy-second Congress, First Session, on Senate Bill 6215 (71st Congress), to establish a National Economic Council, Parts 1 and 2 (October 22 to December 19, 1931), particularly the testimony of Reserve Board, of Mr. L. H. Sloan, Vice-president of the Standard Statistics Dr. E. A. Goldenweiser, director of research and statistics of the Federal

; Milton Handler, "The Constitutionality of Investigations by the Federal Trade Commission," 28 Col.L. Rev. 708, 712-714.

that the existing conditions threaten even the stability of the capitalistic system.[50] Economists are searching for the causes of this disorder and are reëxamining the bases of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition.[51] Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity. In justification of that doubt, men point to the excess-capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from thirty to one hundred per cent more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business.[52] All agree that irregularity in employment—the great-

---

Company, and of Miss Frances Perkins, Industrial Commissioner of the State of New York, pp. 3-150; "When We Choose To Plan", Graphic Survey, March 1, 1932. See also Hearings on December 28, 1931-January 9, 1932) the La Follette-Costigan Bills, Senate Bills Nos. 174, 262, and 3045 (72d Congress).

[50]See Edward S. Corwin, "Social Planning under the Constitution", 26 American Political Science Review 1; W. B. Donham, "Business Adrift", (1931), p. 165; "America Faces the Future", edited by Charles A. Beard, (1932), pp. 1-10; Paul M. Mazur, "New Roads to Prosperity", (1931), c. V.

[51]W. B. Donham, "Business Adrift", pp. 141, 142; "The Swope Plan", edited by J. George Frederick, (1931), pp. 70, 73, 128; Richard T. Ely, "Hard Times, The Way In and the Way Out", (1931), pp. 62-64, 135, 137; "The Menace of Overproduction", edited by Scoville Hamlin, (1930); Dexter M. Keezer and Stacy May, "The Public Control of Business", (1930), p. 83; Walker D. Hines, "Planning in a Particular Industry", Bulletin of the Taylor Society, October, 1931; Philip Cabot, "The Vices of Free Competition", The Yale Review, Autumn, 1931; Julius H. Barnes, "Business Looks at Unemployment", Atlantic Monthly, August, 1931; "The Federal Anti-Trust Laws: A Symposium", edited by Milton Handler (December, 1931).

[52]The depression which began in 1929 has greatly reduced the present consumptive capacity; and the loss of export trade, and the arrest in the growth

est of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. There are plans for proration. There are many proposals for stabilization.[53] And some thoughtful men of wide business experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules.[54]

---

in population (resulting from the lessened birthrate and the practical stoppage of immigration), apparently precluded the rapid increase of consumptive capacity which followed the earlier periods of depression.

[53]See Charles A. Beard, "America Faces the Future", (1932), pp. 117-140; "The Swope Plan", edited by J. George Frederick (1931); Report No. 12 of the Committee on Continuity of Business and Employment of the United States Chamber of Commerce, October 2-3, 1931; Report of the Executive Council, American Federation of Labor to the 51st Annual Convention, October 5, 1931; Stuart Chase, "A Ten Year Plan for America", Harpers' Magazine, June, 1931; George Soule, "What Planning Might Do", New Republic, March 11, 1931; "When We Choose to Plan", Graphic Survey, March 1, 1932; "The New Challenge to Scientific Management", Bulletin of the Taylor Society, April, 1931; Robert J. McFall, "Planning Industry", *id.*, June, 1931; Horace B. Drury, "The Hazard of Business", *id.*, December, 1931; Grover A. Whalen, "National Planning", *id.*, February, 1932; J. Russell Smith, "The End of An Epoch", Graphic Survey, July 1, 1931; Mary van Kleeck, "Planning and the World Paradox", *id.*, November 1, 1931; Lewis L. Lorwin, "The Origins of Economic Planning", *id.*, February 1, 1932; H. S. Person, "Scientific Management as a Philosophy and Technique of Progressive Industrial Stabilization", paper presented at World Social Economic Congress, August, 1931; "When Will America Begin to Plan?" Christian Century, March 11, 1931. See, generally, Hearings before the La Follette subcommittee, on S. 6215, *supra*, note 49. Compare Editorial Research Reports, Washington, D. C., August 1, August 8, December 3, 1931.

[54]See Charles R. Stevenson, "The Way Out", (1932), particularly pp. 27, 31, 33; Philip Cabot, "The Vices of Free Competition", The Yale Review, Autumn, 1931; J. A. Hobson, "The State as an Organ of Rationalization", Political Quarterly, January-March, 1931; and the discussions by Professor Beard and Messrs. Swope, Chase, Soule and Smith, *supra*, note 53. Concerning the bituminous coal business, see United States Coal Commission, Final Report 1925, Part I, pp. 268, 269; "Opening New Mines on the Public Domain: A Way of Order for Bituminous Coal", by Walter H. Hamilton and Helen R. Wright, pp. 35-37; "The Case of Bituminous Coal", by Walton H. Hamilton and Helen R. Wright, pp. 170-173; 263, 264; Willard E. Atkins, *et al.*,

Whether that view is sound nobody knows. The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The obstacles to success seem insuperable.[55] The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task; and each of the thousands of these judgments would call for some measure of prophecy. Even more serious are the obstacles to success inherent in the demands which execution of the project would make upon human intelligence and upon the character of men. Man is weak and his judgment is at best fallible.

Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. There are many men now living who were in the habit of using the age-old expression: "It is as impossible as flying." The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the

---

"Economic Behavior", (1931), c. XXII; Senate Bill No. 2935, §§ 2, 8 (72d Congress), introduced by Senator Davis, and report of hearings, U. S. Daily, March 15, 1932, p. 1. Concerning petroleum and gas, see Ralph H. Fuchs, "Legal Technique and National Control of the Petroleum Industry"; J. Howard Marshall and Norman L. Myers, "Legal Planning of Petroleum Production", 41 Yale Law Journal 33; Samuel H. Slichter, "Modern Economic Society", 861, 862.

[55]Compare Sumner H. Slichter, "Modern Economic Society, (1931), pp. 872-888; Charles Whiting Baker, "Pathways Back to Prosperity", (1932), pp. 59-61; Samuel Crowther, "A Basis for Stability", (1932), pp. 3-17; J. Franklin Ebersole, "National Planning", Bulletin of the Taylor Society, August, 1931; Virgil Jordan, "Some Aspects of National Stabilization", Mechanical Engineering, January, 1932; "What Price Stability", The Annalist, October 9, 1931; Warren Bishop, "The Rain of Plans", The Nation's Business, October, 1931; Myron W. Watkins, "The Economic Philosophy of Anti-Trust Legislation", Annals of the American Academy of Political and Social Science, January, 1930; Albert W. Atwood, "The Craze for National Planning", Saturday Evening Post, March 19, 1932.

fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.[56]

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.[57] We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Mr. Justice STONE joins in this opinion.

---

[56]Compare Charles Warren, "The New 'Liberty' under the Fourteenth Amendment", 39 Harv. L. Rev. 431.

[57]Compare Felix Frankfurter, "The Public and Its Government", pp. 49-51.